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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-497

JOHN HALL CANNON
Petitioner

versus

STATE OF SOUTH CAROLINA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner, John Hall Cannon prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina entered in the above entitled case on June 20, 1973.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at 197 S. E. 2d 678, and is set forth in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered June 20, 1973.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), Petitioner having asserted below and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law and his rights under the Fifth Amendment to freedom from forced self-incrimination by the admission into evidence of a confession without a consideration of the evidence of the insanity of Petitioner and without any determination as to whether the confession was a voluntary product of a rational intellect and a free will.

2. Whether Petitioner was denied due process of law by the Trial Court admitting into evidence a confession which was secured from Petitioner after an incomplete warning of his rights was given him and after an impermissible explanation of those warnings was given Petitioner.

3. Whether Petitioner was denied due process of law by the Trial Court admitting into evidence a confession which was not freely and voluntarily given but was instead the product of coercion.

4. Whether Petitioner was denied due process of law by the Trial Court's refusing to instruct on the question of insanity under the Federal Rule as requested and instead, instructing under the M'Naghten Rule.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment, Sixth Amendment, Eighth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF FACTS

On November 29, 1971, Petitioner lived in Conway, South Carolina with his grandmother. His mother, who was divorced from Petitioner's father lived about 125 miles from Conway in Columbia, South Carolina and was married to Edward Holbrook Wyman. On Friday morning, November 26, 1971, the maid employed by the Wymans found the dead bodies of the Petitioner's mother, stepfather and half-brother. (R. 56) All had died of pistol-

shot wounds. (R. 48) The matter was reported to police authorities and an intense investigation was begun.

On November 29, 1971, after attending the funeral of his mother, Petitioner was travelling with his father back to Conway. About four miles outside the city limits of Columbia, South Carolina, the Petitioner and his father were stopped by Richland County Sheriff Frank Powell and Petitioner was arrested. (R. 139) Petitioner was taken to the South Carolina Enforcement Division Headquarters (SLED) and his father was taken to the Sheriff's Department. (R. 154)

At the time of Petitioner's arrest, he was read his rights from a card by Captain Laverne of the Sheriff's Department. (R. 194)

Petitioner arrived at SLED Headquarters at approximately 5:45 P. M. on the day of his arrest. (R. 167) He was taken into an office along with Sheriff Powell, Lt. Wyndham, Lt. Faulk, Captain Laverne and Captain Gasque. (R. 167) Captain Gasque read the Petitioner his rights again and Petitioner said he understood them. (R. 168) He denied having anything to do with the matter being talked about. (R. 168)

At that point, Petitioner left the room with Lt. Faulk to go into another office in which two polygraph tests were given to the Petitioner. (R. 238) After the second test, Lt. Faulk told Petitioner he was lying, interrogated him ten or fifteen more minutes; then walked out. (R. 240) More interrogation followed by Lt. Wyndham and Lt. Gasque. (R. 169) Petitioner's rights were read to him again. (R. 170) It was at this time that the Petitioner first made his confession. (R. 171) After the initial confession, Sheriff Powell and Captain Laverne came into the room when Captain Gasque and Lt. Wyndham left and interrogated the Petitioner approximately fifteen minutes more. (R. 172)

None of the *Miranda* warnings given included the statement, "if you desire to answer questions now without a

lawyer present, you still have the right to stop answering at any time." (R. 194, 168, 170)

One officer had a card which provided a warning of these rights, but that card was not used. (R. 232) At one point, the rights given were prefaced with the statement that these rights had to be given to anyone "if they were going to have to explain their way into or out of any crime that they might be accused of." (R. 168)

During the last fifteen minute interrogation by Sheriff Powell and Captain Laverne, Captain Gasque got a secretary to get ready to take the confession down in writing. (R. 173)

Petitioner gave this confession in the presence of Sheriff Powell, Captain Gasque, Lt. Wyndham, Lt. Faulk and Miss Waldron, the secretary. (R. 173) Petitioner's rights were read to him again by Captain Gasque. (R. 173) The time was approximately 6:45 to 7:30 P. M. (R. 185) The confession was typed by 10:30 P. M. (R. 185)

The following morning, Petitioner was taken by the police to the South Carolina State Hospital for evaluation. (R. 394)

Petitioner was put to trial for murder of his four year old half-brother. The confession that he had made and certain physical evidence procured through the information therein were admitted into evidence against the Petitioner. (R. 281, 320)

The South Carolina State Hospital psychiatrist testified that Petitioner was sane at the time of the act, though admitting that the Petitioner was an adolescent and that Adolescent Psychiatry is a highly specialized field (R. 400) and that he was not qualified in that field. (R. 400)

An adolescent psychiatrist and a psychologist, both of whom had evaluated the Petitioner, testified that the Petitioner was insane both at the time of the act and at the time of the trial. (R. 364, 376)

The jury rejected the defense of insanity and returned a verdict of guilty of murder with recommendation of mercy. (R. 425)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. With respect to Petitioner's assertion that the confession was admitted without regard to Petitioner's mental state or his ability to understand or resist, the question was first presented in the South Carolina Supreme Court. The exception upon which Petitioner appealed to the Supreme Court was as follows:

> Did the Court err in admitting into evidence defendant's confession since the confession had been obtained by subterfuge and the use of unlawful pressure in violation of his rights under the Fifth, Sixth and Fourteenth Amendments?

The Supreme Court of South Carolina, in affirming Petitioner's conviction, rejected this contention.

2. With respect to Petitioner's assertion that he was denied due process of law by the admitting of a confession against him which confession was secured after incomplete *Miranda* warnings were provided him and an impermissible explanation of those warnings was given him the question was first presented on Petitioner's motion to exclude the confession. This motion was denied and exception taken. (R. 281) Motion was made for a directed verdict, (R. 340) a new trial (R. 426) and a motion for a judgment *Non Obstante Veredicto* (R. 426). These motions were denied.

This assertion was argued in the South Carolina Supreme Court under the exception quoted above. The South Carolina Supreme Court rejected the contention.

3. With respect to Petitioner's assertion that he was denied due process of law in that the Trial Court admitted a confession which was not freely and voluntarily given,

the question was first presented on Petitioner's motion to exclude the confession. This motion was denied and exception taken. (R. 281) Motion was made for a directed verdict (R. 340), a new trial (R. 426) and a motion for a judgment *Non Obstante Veredicto.* These motions were denied.

This assertion was argued in the South Carolina Supreme Court under the exception quoted above. The South Carolina Supreme Court rejected the assertion.

4. With respect to Petitioner's assertion that he was denied due process of law by the Trial Court's refusal to instruct the jury on the question of insanity pursuant to the Federal Rule instead of the M'Naghten Rule, this question was first presented upon request for jury charge by counsel. (R. 409) This motion was denied and exception taken. (R. 410) Motion was made for a directed verdict, (R. 340) a new trial (R. 426) and a judgment *Non Obstante Veredicto.* (R. 426) These motions were denied.

The exception upon which Petitioner appealed to the South Carolina Supreme Court was as follows:

> Did the Court err in refusing Defendant's request for a charge to the jury on the Federal Rule as to insanity as a defense to a criminal charge and by insisting on the M'Naghten Rule as a guide in the case denying the defendant his rights to equal protection of the law and due process under the Fourth and Fourteenth Amendments to the Constitution of the United States?

The Supreme Court of South Carolina rejected this contention.

REASONS FOR GRANTING THE WRIT

I

Petitioner's conviction is unconstitutional in that he was denied due process of law and his rights under the Fifth Amendment to freedom from self-incrimina-

tion by the admission into evidence of a confession without a consideration of the evidence of the insanity of Petitioner and without any determination as to whether the confession was a voluntary product of a rational intellect and a free will.

The Petitioner was brought to trial pursuant to an indictment which charged him with murder. The only evidence presented against Petitioner was a confession that he had made and a gun that was obtained pursuant to that confession.

Petitioner entered a plea of not guilty by reason of insanity. He was found guilty (R. 425) and sentenced to life imprisonment. (R. 427)

The admissibility of the confession was contested in a protracted hearing. The Trial Judge ruled the confession admissible despite the fact that no evidence on the question of sanity had yet been introduced. At no time was there an evaluation of the effect of Petitioner's mental condition on his ability to knowingly waive any rights and enter a confession which was the product of a rational intellect, nor was there any holding on this question.

This case is remarkably similar to the facts set out in this Court's holding in the case of *Blackburn v. Alabama*, 80 S. Ct. 274, 361 U. S. 199, 4 L. Ed. 2d 242. There, as here, there was a diagnosis of paranoid schizoprenia. (R. 352) There, as here, there was separation of the suspect from his family. (R. 154-155) There, as here, there was interrogation by teams of police officers; and there, as here, there were conflicting diagnoses, two doctors testifying that the Petitioner was insane (R. 354-375) and one doctor testifying that Petitioner was sane. (R. 396).

It is necessary to note at this point that in evaluating the mental condition of the Petitioner in this context, the question is not one of criminal insanity or legal responsibility for acts committed, but *only* was his condition such as to raise a reasonable presumption that either his confession or his non-utilization or waiver of his *Miranda*

rights were not a voluntary product of a "rational intellect and a free will." *Blackburn v. Alabama, Supra; Gladden v. Unsworth*, 396 F. 2d 373 (C.A. Or. 1968).

In looking at the Petitioner's mental condition, the record shows the following facts. Dr. Robert S. McCully, Professor and Chairman of the Department of Psychology and Chairman of the Department of Psychiatry at the Medical University of South Carolina and the author of a text dealing with the diagnosis of mental disorders (R. 343), a professional with twenty-two years experience in diagnosing mental disorders, (R. 352) testified that he administered a comprehensive battery of tests to the Petitioner (R. 344, 347, 349) and that his tests showed the Petitioner to be suffering paranoia schizophrenia (R. 352). Dr. McCully described the Petitioner as ". . . a patient in an emotional state of catastrophe who is not distinguishing anything." (R. 362)

Dr. George Orvin, Associate Professor of Psychiatry and Chief of the Adolescent Psychiatric Service of the Medical College of South Carolina and a Diplomat of the American Board of Psychiatry (R. 367) testified that Adolescent Psychiatry is a highly specialized field, requiring specific knowledge (R. 368, 370) and that he practiced exclusively in the area of Adolescent Psychiatry. (R. 371) Dr. Orvin examined the Petitioner and found that he "was mentally ill and had been mentally ill for the past two to three years, possibly four years." (R. 375)

Dr. Roland E. Bieren disagreed with the diagnosis of Drs. McCully and Orvin. Dr. Bieren's background included twenty-eight years practice in Obstetrics and Gynecology, post-graduate research in "medicine, surgery and gynecology" (R. 391), three years training at Hall Institute in Psychiatry and slightly over one year as a practicing forensic psychiatrist and as Chief of the Court Psychiatric Service since July of 1971. (R. 392)

Dr. Bieren stated that "Adolescent Psychiatry is a very specialized field" and that he was not specially qualified

in that field (R. 399) and, further, that during Petitioner's stay at the State Hospital he was not seen by anyone specially qualified in the field. Dr. Bieren testified further, "All I have to determine is whether the man is crazy or not." (R. 406) Though Dr. Bieren states his opinion that Petitioner is not a schizophrenic paranoid he also stated that "I have to determine that he knew the nature of the act, that he knew the quality of the act and that he knew it was wrong. . ." (R. 424) It appears, from the Doctor's testimony that although his examination is not necessarily so limited, his paramount obligation as Chief of the Court Psychiatric Service is determination of sanity as defined by the M'Naghten test. Dr. Bieren stated:

> "Yes, he has to know the nature of the act, he has to know what he did, he has to know the quality of it and he has to know that it was wrong. He must know right from wrong." (R. 398)

Dr. Bieren found that the Petitioner knew the nature and quality of the act committed and yet he never asked the Petitioner any question about the act itself! The transcript reads:

> Q. I said you never asked the Defendant the first time anything about what occurred or anything about it, did you?
>
> A. About what?
>
> Q. The crime.
>
> A. I'm not trying the case. All I have to determine is whether the man is crazy or not.
>
> Q. Now you are using the term 'crazy,' aren't you?
>
> A. All right, mentally ill.
>
> Q. Doctor, I'm going to ask you again, did you ever try to find out what had occurred so you could properly evaluate this man?
>
> A. What occurred in the alleged offense has no bearing upon this man's mental condition." (R. 406)

It is difficult to perceive the method by which one would determine a patient's appreciation for the "nature and quality" of a particular act committed without some correspondence as to the act itself. The Court is asked to compare this position with that of Dr. Orvin, who, while being careful to avoid any knowledge of circumstances before evaluating Petitioner so as not to prejudice his judgement, (R. 372) did elicit the necessary background information from Petitioner himself (R. 374) and then compared this information at a later time to independent information about the act.

Dr. Bieren testified that his only task was to determine if the Petitioner was "crazy." Not only is the language anathema to all recognized authorities but the limited nature of the investigation fails to adhere to the basic requirements for evaluation established by every discoverable published authority. The Court might well evaluate this position as simply poor articulation of the evaluation procedure followed. Dr. Bieren's subsequent answers dispel this notion. The witness stated that he had not asked the Petitioner any questions about the act committed. (R. 406) Indeed, he affirmatively asserted that "what occurred in the alleged offense has no bearing upon this man's mental condition." (R. 406) Dr. John McDonald of the University of Colorado School of Medicine and one of the nation's leading forensic psychiatrists states:

> "In order to determine the suspect's state of mind at the time of the alleged crime, it is necessary to ask him about his thoughts, feelings and actions before, during and after the time of the crime. The suspect's behavior on the day of the crime should be recorded in special detail. Thus, the suspect should be asked to describe everything that happened from the time he got up in the morning until he retired to bed again that night or the following morning. A note should be made of all food, alcohol and drugs consumed. It may be necessary to go over the account several times

in order to make sure that nothing has been overlooked. Important information is more likely to be brought to light if this practice is followed routinely." Dr. John M. McDonald, *Psychiatry and the Criminal*, Charles C. Thomas Co., Springfield, 1958.

By his answers on re-direct, Dr. Bieren reaffirms that his role is one of determination of sanity under the present legal definition in South Carolina and is not related to treatment or treatment evaluation.

It is submitted that the evaluation of Dr. Bieren was not performed to show mental state or capacity save in that that capacity falls above or below the State of South Carolina's legal definition of sanity and thus is not indicative of mental disorder that would bear on the questions of whether the Petitioner gave a confession and waived his rights with "rational intellect and a free will."

There is one portion of Dr. Bieren's testimony, however, that does shed light on the Petitioner's mental and emotional condition at the time of questioning. Petitioner was admitted to the South Carolina State Hospital on the morning after the interrogation, November 30, 1971 and first examined by Dr. Bieren on the following day. (R. 394) Dr. Bieren found him too tense and too upset to cooperate in the observation period (R. 405) and to calm him down, he prescribed a drug that he admits was both a sedative and a "hypnotic." (R. 401, 402)

If Petitioner was in such an emotional state two days after the interrogation, what must have been his state during that afternoon and evening at SLED Headquarters?

The holding of this Court in *Blackburn v. Alabama*, *Supra*, is that conclusive demonstration of the involuntariness of a confession at any stage of a trial dictates exclusion of that confession.

It is submitted that unequivocal testimony of two professionals of long experience and unquestionable creden-

tials to the effect that Petitioner is mentally ill and has been for a number of years, weighed against the testimony of a third professional who conducted a limited examination for a limited purpose and who is a relative newcomer to the profession and who, further, freely admits that the practice of Adolescent Psychiatry is a "highly" specialized field in which he is not specially qualified, leaves substantial doubt that at the time of interrogation the Petitioner was mentally capable of voluntarily confessing or of waiving any rights with "rational intellect and of a free will."

It must again be pointed out that the test set out is separate and distinct from any State test of legal accountability for criminal actions and that the right to suppression of any confession not meeting the test as herein before set out is one guaranteed by the United States Constitution through its Fourth, Sixth and Fourteenth Amendments. And, while a state might adopt stricter rules of criminal procedure than those of the Federal System, those rules may not infringe on guarantees of the United States Constitution. *Burgett v. Texas*, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 606.

The Supreme Court of South Carolina rejected the application of the ruling in *Blackburn v. Alabama*, *Supra*, and in a footnote to their decision, explained why"

> "1. In *Blackburn*, the medical testimony was so compelling that it established the strongest probability that the defendant was mentally ill and thus conclusively demonstrated the involuntariness of the confession. In this case, a finding that the defendant was insane or mentally ill is by no means compelled."

In so doing, the Court appears to have rejected any distinction that might be drawn between a degree of mental illness that would negate criminal culpability under the State of South Carolina's version of the M'Naghten Rule and that degree of mental illness that would render an accused incapable of entering a knowing waiver of rights

or of giving a confession was the product of a "rational intellect and a free will"

The South Carolina Supreme Court limited *Blackburn* to those cases in which there is the ". . . strongest possibility that the defendant is mentally ill." This is in conflict with *Blackburn*. In that case, this Court stated:

> "Of course, it is quite true that we are dealing here with probabilities. It is *possible*, for example, that Blackburn confessed during a period of complete mental competence. Moreover, these probabilities are gauged in this instance by the opinion experts. But this case is novel only in the sense that the evidence of insanity here is compelling, for this Court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was 'of low mentality, if not mentally ill,' *Fikes v. Alabama*, 352 U. S. 191 1. L. Ed 2d 246, 77 S. Ct. 281 or had a 'history of emotional instability.' " *Spano v. New York*, 360 U. S. 315, 3 L. Ed. 2d 1265, 79 S. Ct. 1202.

This is in accord with this Court's subsequent decisions to the effect that it is incumbent upon a Court to indulge "every reasonable presumption" against the relinquishment of a constitutional right. *Barker v. Wingo*, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

For the above cited reasons and pursuant to the cited authority, it is urged that the failure to re-evaluate the voluntariness of the confession after presentation of the evidence as to the mental condition of the Petitioner was a denial of due process of law. Further that the introduction of that confession against him, despite the testimony as to mental incompetence was a further denial of due process of law and freedom from self-incrimination guaranteed the Petitioner by the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

II

Petitioner's conviction is violative of due process of law in that the trial court admitted into evidence a confession which was secured from Petitioner after an incomplete warning of his rights was given him and after an impermissible explanation of those rights was given Petitioner.

When *Miranda v. Arizona*, 86 S.Ct. 602 was decided, Justice Marshall very clearly spelled out the applicable test:

> "The following measures are required. Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used against him and that he has a right to presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."

It is clear that the right to an attorney during custodial interrogation is a continuing one. It is equally clear that the right to terminate the interrogation is a continuing one. It is not clear that "Miranda" warnings must include a statement of these continuing rights.

The reason that "Miranda Warnings" are necessary is obvious. There can be no knowing, voluntary, intelligent waiver of rights without knowledge of the existence of those rights. It would seem that the continuing right to attorney and to terminate interrogation must be exercised or waived before any admissible statement can be obtained just as surely as any other Miranda right.

Perhaps because the reporting authorities chose to break up the Justice's statement into three separate headnote paragraphs, many police authorities adopted only the first of the three paragraphs as the "Miranda Warnings," that is, the warnings that:

1. You have the right to remain silent;

2. Any statement you might make may be used as evidence against you; and,

3. You have a right to the presence of an attorney, either retained or appointed.

The continuing right to counsel and to silence were not at first adopted in the standard card warning.

It is clear that Miranda requires a total warning and leaves no room for speculation as to knowledge possessed and inference drawn. The Court states:

> " . . . whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time" 16 L. Ed. 2d at 720."

The police agency which secured the confession and the trial judge who admitted it into evidence were apparently under the impression that the continuing right to an attorney and the continuing right to stop the interrogation were rights that must be affirmatively waived.

The statement prepared at SLED Headquarters and signed by the Petitioner reads as follows:

> "I have been advised that I have the right to remain silent and that anything I say can and will be used against me in a Court of Law. I have been advised that I have the right to talk to a lawyer and have him present when I am being questioned. I have been advised that if I cannot afford a lawyer that the State will appoint one to represent me without cost. *I have been advised that any time during the questioning if*

there is a particular question I do not want to answer that I do not have to do so. I have been advised that I can terminate the questioning at any time by saying that I do not wish to answer any more questions." (R. 293, 296, Emphasis added)

The Trial Judge, as a finding of fact, decided:

"We further find that the Petitioner was advised of his constitutional rights, the right to have an attorney present with him during the interrogation, that the Court would appoint an attorney for him if he was without funds with which to employ one without cost to him, that he had the right to remain silent, *he had the right to terminate the interrogation at any time and not answer any questions.*: (R. 281, Emphasis added.)

The finding as to the emphasized portion of the rights is not only not warranted, it is in direct contravention of the evidence in this case.

It must be kept in mind that Petitioner gave a statement at least twice before it was reduced to writing. The first statement was given in the presence of Captain Gasque (R 143-148) and Lt. Wyndham (R. 142). The Petitioner next gave his statement to Sheriff Powell and Captain Laverne (R. 285). The Petitioner then gave a statement before Capt. Gasque, Lt. Wyndham, Sheriff Powell, Lt. Faulk and a stenographer, Miss Waldron.

It is necessary that the three separate statements be kept in mind, because the admissibility of a statement must be predicated on the admissibility of any statement which preceded it. If the first confession is invalid for lack of warnings then a subsequent confession is also tainted. *Cagle v. State*, 45 Ala. 43, 221 S 2d 119, Cert, denied 284 Ala 727, 221 So 2d 121 (1969). The only way the subsequent confession could be resurrected is by informing the Petitioner of the fact that the first confession is inadmissible in a Court of Law, then securing a free

and voluntary confession after proper warnings. *Williams v. US.*, 328 F 2d 669 (5th Cir. 1964) See generally, Syracuse L. Rev. 16 p. 146, Fall, 1968.

Turning attention then to the first statement of Petitioner, there is no conflict in the transcript as to the nature of the rights of which he was informed to the point of that first statement.

Captain Laverne read the following rights:

> "You have the right to remain silent; anything you you say can and will be used against you in a Court of Law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one." (R. 194)

Captain Gasque read the petitioner his rights when Petitioner arrived at SLED Headquarters. Sheriff Powell states that "he had his card and he read it to him." (R. 142). The rights read by Captain Gasque were identical to the ones set forth above. (See Captain Laverne's testimony, (R. 194) and Captain Gasque's testimony. (R. 168)

Petitioner first gave a statement to Captain Gasque and Lt. Wyndham. This statement, Petitioner contends, is inadmissible for absence of sufficient warnings. The Petitioner next related his statement to Sheriff Powell and Captain Laverne. The warnings preceding the statement are set out above. Thus, for the same reason, the second statement is inadmissible. The Petitioner then gave a third statement in the presence of the stenographer. Prior to this statement, he is again given Miranda warnings by Captain Gasque. This statement was again from Captain Gasque's "Miranda Card." (R. 168)

Prior to reducing this last statement to writing, Captain Gasque told petitioner:

> "I further explained that during the taking of his statement, if he wanted to stop he could and that to

make sure that what he told me was correct and that I assured him that when it was reduced to writing and typed out that it would be gone over very carefully and if there were any changes he wanted to make he could make them before signing it." (R. 174)

Thus, the third and last statement also is lacking sufficient Miranda warnings unless Captain Gasque's above quoted language is curative. It is strongly urged that all said language does is authorize stops for the purpose of corrections and in no way advises Petitioner of the right to stop the statement itself. And, if Captain Gasque's statements were sufficient, this third statement is still inadmissible in that it is predicated upon the previous inadmissible statements.

The language of the written statement itself has been previously quoted and spells out all of the Miranda warnings necessary. It must be pointed out, however, that the transcript is very clear that the rights contained in the statement are "a standard preamble insertion that's done on our statement form" (R. 312) and were not read to or by the Petitioner until the statement had been prepared for signature. (R. 313). At no time prior to any of the three statements given were the rights, as contained in the statement, read to Petitioner.

If this Court were faced with a situation where sufficient rights were once proferred, then insufficient rights were given prior to the giving of a statement, the Court could well find that the giving of the sufficient rights is curative. That is not the case before the Court. Here, insufficient rights were given and then a statement, then another statement given, then other insufficient rights given and then a third statement given and finally sufficient warnings are given immediately prior to the signing of the third statement which had been reduced to writing. There can be no curative offerings after an inadmissible statement unless the Petitioner is advised that the previous

statement or statements are infirm. *Williams v. United States, supra; Cagle v. State,* Supra.

This Court, then, must separately evaluate each of the three statements given and since only the third was admitted into evidence, must find that all three are admissible before it can permit admission of the third.

To do so, the Court must hold that the *Miranda* warnings do not necessarily include the continuing rights that Petitioner now urges upon this Court.

The Supreme Court of South Carolina rejected this contention of petitioner, stating:

> "The evidence indicates that the following warning was in essence given to the Petitioner at the time of arrest and at least three other times throughout the interrogation by different officers:
>
> 'You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one."
>
> Petitioner contends that the initial warnings were insufficient and incomplete; he argues they should have included, as did the warning included in the typed statement, in effect the following:
>
> "If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering at any time or until you talk to a lawyer."
>
> We do not agree that *Miranda v. Arizona*, 384 U.S. 486, 86 S. Ct. 1602 (1966), required the inclusion of the above when informing a person of his rights."

The Court cites *State v. Jones*, 196 N.W. 2d 606 (Minn. 1972), *Flannagin v. State*, 266 So. 2d 643 (Ala. 1972) and *Watts v. State* 262 So 2d 630 (Ala. 1972) as persuasive authority.

Petitioner would point out that this Court has held that before a constitutional right can be waived there must be a determination that the waiver was freely, voluntarily and knowingly entered into of the Defendant's own free will. *Chambers v. Florida*, 309 U.S. 227, 84 L.Ed. 716, 605 S.Ct. 472. Waiver is never to be presumed from any failure in attempt to exercise rights. *Sullins v. United States*, 389 F. 2d 985 (10th Cir. 1968) Indeed, Courts should indulge every reasonable presumption against waiver. *Barker v. Wingo*, Supra.

Petitioner would further point out that the whole thrust of *Miranda* is that a person will not be presumed to have knowledge of the existence of any right. Before he can waive a right, he must be informed of its existence.

Logic would indicate, then, that if Petitioner has the constitutional right to halt interrogation and request an attorney at any stage of that interrogation, those rights were not waived and any confession obtained is inadmissible.

The warnings given Petitioner were inadequate for a separate but closely related reason. Captain Gasque testified that he prefaced the Miranda warnings as follows:

> "I told him that we wanted to talk to him and at this stage of our inquiry he was entitled for his warning under Miranda and I explained Miranda was a Court Ruling that certain rights had to be explained to each person *if they were going to have to explain their way into or out of any crime that they might be accused of.*" (R. 168 Emphasis added.)

It is strongly contended that this is an impermissible explanation of *Miranda* rights in that it practically states that Petitioner must speak. As to the effect of misleading explanatory statements accompanying *Miranda* warnings, see: *United States ex rel. Vanderhorst v. LaValles*, 285 F. Supp, 233, aff. 'd 417 F. 2d 411 Cert. Denied, *McNann v. Vanderhorst*, 90 S. Ct. 930, 397 U.S. 925, 25 L. Ed. 2d

105. This case clearly holds that it is forbidden to suggest or announce, contrary to the Constitution, that Petitioner is under any kind of duty to confess. The Court is asked to consider Captain Gasque's statement in light of this case and in light of this Court's mandate that a Court indulge every reasonable presumption against waiver. *Barker v. Wingo*, Supra.

The Court is asked to view the warnings given Petitioner in the light of this impermissible warning. Petitioner respectfully contends that the warnings given were inherently insufficient and that the explanation of those warnings was constitutionally impermissible. Petitioner further contends that the two infirmities taken together cast grave doubt that Petitioner could have known of his continuing constitutional rights to silence at any point during his recitation of a statement.

III

Petitioner's conviction is violative of due process of law in that it was based entirely upon a confession that was not freely and voluntarily given but was instead the product of coercion.

In addition to the two tests of *Miranda*, proper warning and a knowing waiver, a confession must still be held to the old test of voluntariness. *Parker v. Sigler*, 413 F. 2d 459, vacated 90 S. Ct. 667, 396 U. S. 482, 24 L. Ed. 2d 672 (1969). *Morales v. Rodriques*, 373 F. 2d 15 (1967).

The tests of voluntariness of confession and of waiver are basically identical and will, for the sake of brevity, be treated together although Petitioner continues to urge that the lower court erred in finding voluntariness in each separate case.

The basic standard to be applied in voluntariness of waiver of confession is a consideration of the "totality of circumstances." *United States ex rel. Gockley v. Myers*, 314 F. Supp. 830 (D.C. Pa. 1970); *Parker v. Sigler, Supra.*

The Court must look to component parts of the situation surrounding the statement and determine if there is a single part or if cumulatively there has been either a negligent or willful disregard of any Fifth, Sixth and Fourteenth Amendment rights in procuring the statement. *Boulden v. Holman*, 385 F. 2d 102, rehearing denied 393 F. 2d 932, rehearing denied 395 F. 2d 1969, cert. granted 89 S. Ct. 224, 393 U. S. 822, 21 L. Ed 93, vacated 89 S. Ct. 1138, 394 U. S. 478, 22 L. Ed. 2d 433 (1967).

Decisions break down the factors to be considered and the factors which Petitioner urges form an unconstitutional whole are hereinafter separately discussed.

1. The Petitioner is a minor and his age and educational background can and should be considered by the Court. In one case, a 19 year old youth and South Carolina public school graduate, who was questioned for about the same length of time as the Petitioner, was held, because of his youth and lack of sophistication to be at an extreme disadvantage before a trained interrogator. *United States ex rel Vanderhorst v. Lavelles, Supra. McNann v. Vanderhorst, Supra.* For the necessity of viewing age, education and experience as part of the "totality" of confession, the case are *West v. United States*, (5th C. C.A. Fla) 399 F. 2d 467, Cert. denied 393 U. S. 1102, 89 S. Ct. 902, 2 L. Ed. 2d 795; *Gallegos v. Colorado*, 82 S. Ct. 1209 (1962); *Haley v. Ohio*, 332 U. S. 596, 92 L. Ed. 224, 68 S. Ct. 302.

2. The Petitioner was interrogated by teams of officers. The Court should consider both the length and intensity of the interrogation. *Brown v. United States*, 356 F. 2d 230, (C.A. Kan. 1966); *United States ex rel Castro v. LaValee*, 282 F. Supp. 718 (C.D. N. Y. 1968). The test is not whether the conduct of officers was shocking but whether it was such as to overbear the Petitioner's will to resist. *Milton v. Wainwright*, 306 F. Supp. 929 aff'd. 428 F. 2d 463 (D. C. Fla. 1969); *United States ex rel Caserino v. Denno*, 259 F. Supp. 784 (D.C. N. Y. 1966).

In the case at hand, the Petitioner was taken into

custody on the highway and transported to SLED Headquarters by Captain Laverne and Lt. Ward of the Richland County Sheriff's Department. He was arrested at approximately 4:45 P. M. (R.155). He arrived at SLED at approximately 5:45 P. M. (R. 167). He was immediately interrogated for an undetermined amount of time by five police officers, all of the rank of Lieutenant or above, that is: Lt. Wyndham, Lt. Faulk, Captain Laverne, Captain Gasque and Sheriff Powell. He was taken by Lt. Faulk to a separate room and interrogated pursuant to a polygraph examination. He spent approximately twenty minutes with Faulk. (R. 233) He was then questioned by Captain Gasque and Lt. Wyndham (R. 169) then by Sheriff Powell and Lt. Laverne and then, finally by Captain Gasque again in the presence of all of the officers.

In the light of the decisions cited and the totality of circumstances as brought out in the transcript and cited herein, the Court erred in finding that the will of the Petitioner was not overbourne.

3. The Petitioner was arrested shortly after attending the funeral of family members that he is accused of killing. He had to be distraught and upset at the time. While there are no discoverable cases on point, it has long been the rule that no confession is admissible if obtained from an accused shortly after an arrest requiring force. *Payton v. United States*, 222 F. 2d 795 (1955); *McAffee v. United States*, 70 App. D. C. 142, 105 F. 2d 21; *Ziang Sung Wan v. United States*, 266 U. S. 1, 16-17, 45 F. Ct. 14, 69 L. Ed. 131. The rationale is that there is an aura of coercion that extends to the period of confession. While it is not contended that a distraught condition has the same prohibitive effect, it is submitted that it is incumbent on the Court to consider the incidents surrounding arrest insofar as they bear on the state of mind and capacity of Petitioner at the time of making the statement.

4. The Petitioner from the time of his arrest was inten-

tionally separated from his father. Sheriff Powell testified that the father was sent to the Sheriff's Office (R. 154) and that the Petitioner was taken to SLED Headquarters. (R. 141) While there is some controversy in the transcript as to whether the father was deliberately denied access to his son, there is no controversy that they were intentionally separated and that no access was afforded. The effect of isolation from the advice or the moral support of friends and relatives has been recognized as a strong coercive factor from the time of *McNabb*. *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608, 612 (1943). *Miranda v. State of Arizona, Supra.* The action of the authorities in so structuring the interrogation as to assure the separation of father and son, when viewed with the other factors present, should have been held to be excessive coercion invalidating any confession given.

5. At the time of the interrogation the Petitioner was undergoing great emotional distress. This is evidenced by the fact that the State's psychiatrist, upon seeing him some thirty-six to forty hours later, found it necessary to administer a sedative to Petitioner because he found him too tense and too upset "to cooperate in the observation period" without it. (R. 405)

All of the above cited factors taken as a whole, compel the conclusion that "the totality of circumstances" was such as to over-bear the will of Petitioner to resist. Petitioner respectfully contends that his conviction, being predicated solely on an involuntary confession, must be reversed.

IV

Petitioner was denied due process of law by the trial court's refusal to instruct on the question of insanity under the Federal Rule as requested, and instead, instructing under the M'Naghten Rule.

Due process of law requires the adoption of a test of criminal responsibility that negates the possibility of

punishing a defendant for an act which is the product of a mental disease and not the product of the free will of the defendant. This argument was made to this Court and was rejected. The Court felt that the state of the science of psychiatry had not advanced to the point that due process would require abolition of the right and wrong test. *Leland v. Oregon*, 343 U. S. 790, 800-801 (1952)

This Court's decision is now twenty years old and the science of diagnosis and treatment of mental disorders has substantially advanced. There is now almost universal agreement among psychiatrists that M'Naghten's exclusive focus on cognition is against the body of medical knowledge. *Criminal Responsibility and Mental Disease*, Dr. C. R. Jeffrey, Charles C. Thomas Publishers, Springfield, 1967.

Punishing an individual because of an act which is the product of mental disorder is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. This contention was rejected by the United States Court of Appeals for the Ninth Circuit in the case of *Jackson v. Dickson*, 325 F. 2d 573, (9th Cir. 1963) Cert. Denied 377 U. S. 957 (1964) However, this Court has decided that punishment for narcotics addiction is cruel and unusual punishment. The Court recognized addiction as a disease or product of a diseased mind. *Robinson v. California*, 370 U. S. 660 (1962).

Robinson has been extended beyond pure punishment for status situations. These cases include drug possession by an addict, *Watson v. United States*, 439 F. 2d 442, (D. C. Cir. 1970) and punishment of an alcoholic for acts committed as a consequence of his disease. *Budd v. Madigan*, 418 F. 2d 1032 (9th Cir. 1969); See Also, *United States v. Astor*, 317 F. Supp. 860 (D.C.C. 1970) and *Roberts v. State*, 41 Wisc. 2d 537, 164 N. W 2d 525 (1969).

If an anti-social act can be determined by the best scientific methods available to be the product of a diseased

mind, it is cruel and unusual to effect punitive measures against the person so afflicted.

More than one hundred years ago, the New Hampshire Court stated:

> "The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected." *State v. Pike*, 49 N. H. 399, 428 (1869).

Mental incapacity was first recognized as a defense in the Twelfth Century. The test was referred to as the "wilde beeste" test. Although many of the great legal minds, notably Sir Matthew Hale, argued for a more liberal approach, this test prevailed until at least 1724. *Rex v. Arnold*, 16 How. St. Tr. 695 (C. P. 1724) In 1800, "insane delusions" was added as a basis for a finding of insanity. *Hadfield's Case*, 27 How. St. Tr. 1281 (K.B. 1800).

Daniel M'Naghten was tried in 1843. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843) The jury was instructed that it was to decide whether at the time of the crime the Defendant "had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act" and was to be found guilty if he was "in a sound state of mind" The House of Lords was asked by the Crown to clarify the rule and did so in the following language:

> "(T)o establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

It is interesting to note that *M'Naghten's Case* was the first case to admit expert psychiatric testimony. This is most probably the reason that the decision reflected the state of the science in 1843. The test as above stated

was actually quite broad and allowed leeway in definition of "diseases of the mind" while preventing acquittals solely because of the presence of some mental infirmity at the time of the commission of the Act. Unfortunately, the test came to be interpreted as requiring a cognitive understanding of the difference between right and wrong. Diamond, *From M'Naghten to Currens and Beyond*, So. Calif. Law Rec. 189 (1962).

This country adopted the M'Naghten Rule or, actually the "right-wrong" portion thereof and held strictly to it until 1929. In that year the "irresistable influence" addition first was promulgated. *Smith v. United States*, 36 F. 2d 548 (D.C. Cir. 1929).

There was one exception to the adherence to the M'Naghten Rule. The New Hampshire Court rejected the test as recognized in this country in 1869 because of its failure to conform to the state of science. *State v. Pike, Supra.* The test accepted by this early New Hampshire Court was " . . . if the homocide was the offspring or product of mental disease in the Petitioner, he was not guilty by reason of insanity."

The New Hampshire Rule was first followed by another jurisdiction eighty-five years later in the case of *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954) The Durham Rule is "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect." In substance this the same rule as announced in *State v. Pike, Supra.*

The *Durham* Rule soon became too rigid to permit easy incorporation of advances in psychiatric knowledge. Perhaps in anticipation of this, the American Law Institute incorporated a model sanity rule in its Model Penal Code of 1955. That rule is:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate

the criminality of his conduct or to conform his conduct to the requirements of the law.

(2) The terms "mental disease of defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

This was not adopted as a rule of any jurisdiction until 1961. *United States v. Currens*, 290 F 2d 751 (1961).

At present the American Law Institute rule is followed in every federal circuit except the First Circuit and the District of Columbia. The District of Columbia's rule is now on consideration, *Brawner v. United States*, Criminal No. 22, 714 (D.C. Cir. Filed Feb. 6, 1969) and the First Circuit has not ruled on the issue since 1962. *Beltran v. United States*, 302 F. 2d 48 (1st Cir. 1962).

Nine states have adopted the American Law Institute's rule either by decision or by statute: Idaho, Illinois, Indiana, Kentucky, Massachusetts, Missouri (by statute), New York, Vermont and Wisconsin. Several of those states have followed the lead of the Federal Courts and modified the American Law Institute's rule by substituting "wrongfulness" for "criminality."

Three states followed and modified versions of the Durham Rule: Maine (by statute), New Hampshire and New Mexico.

The majority of states still follow M'Naghten though many have modified the rule either in terms of a "diminished responsibility" test or an "irresistible influence" test.

At the beginning of the 1960's New Hampshire had been joined by only the District of Columbia in rejecting a right-wrong test. Jurisdictions followed the New Hampshire Courts recognition of the inadequacy of M'Naghten in approximately half the cases arising since 1960. There is a good reason. The science of psychiatry has developed beyond that rule. It is now obvious to the psychiatrist that some subjects are fully capable of verbalizing rules of jus-

tice and morality without possessing the capacity of understanding those rules or of conforming their conduct to them. J. Piaget, *Psychology and Epistemology* 50 (1971).

In this case the trial Court came very close to instructing the jury in the basics of the "wilde beeste theory."

> . . . . since intent is an essential element of the crime of murder, one who is so insane or mentally unsound as to be incapable of entertaining a criminal intent cannot be guilty of the crime or held responsible therefor." (R. 419)

The law of South Carolina is in fact the M'Naghten Rule only in part. The Trial Judge charged:

> "Under the laws of this State the test is this, did the Defendant have at the time of the alleged act mental capacity sufficient to distinguish moral or legal right from moral or legal wrong and recognize the particular act charged as morally or legally wrong. If so, he would be mentally responsible. Otherwise, he would not be and should be acquitted as insane." (R. 419)

The Supreme Court of South Carolina in this case, attempting to adhere to the M'Naghten rule stated:

> "It should be comforting to those who would attack the M'Naghten rule to realize that a layman jury, regardless of the rule recited, normally takes a common sense approach and determines whether the accused person is, first, guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be excused of the crime because of his mental condition. We adhere to the M'Naghten rule."

This understanding of the defense of insanity is the ultimate misunderstanding of the M'Naghten rule. It totally fails to appreciate that insanity is not a plea in mitigation. Rather, the defense reaches to the cognitive ability of the individual to formulate or appreciate the intent to do an act which society prescribes. One whose mental disorder is responsible for a prescribed act is no more guilty at law

than is a child whose age renders it incapable of criminal intent.

The mentality that asks, "Is he guilty, is he crazy, what do we do with him" is responsible for the creation of separate but equal prisons for the guilty and the insane. It is this mentality that causes the State of South Carolina, like so many states, to need a psychiatric ward in the state prison for incoming prisoners that Courts have labeled "sane".

Ultimately, our burgeoning social-legal conscience which we call due process of law will dictate that we first ask, "Is he suffering a mental disease" and, getting an affirmative answer we ask, "What treatment is necessary."

The facts in this case leave little room for doubt that this Petitioner is mentally ill. Yet we try him under a definition of insanity formulated when people suffering from mental disease were treated by being chained to the wall.

Petitioner urges that due process of law requires the adoption of a test of criminal responsibility that negates the possibility of punishing a Defendant for an act which is the product of a mental disease and not the product of the free will of that Defendant.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, ... Respondent.

v.

John Hall Cannon, ... Appellant.

Appeal From Richland County
George T. Gregory, Jr., Judge

Opinion No. 19642
Filed June 20, 1973

AFFIRMED

Henry W. Kirkland, of Kirkland, Aaron & Alley; and Theodore W. Law, Jr., all of Columbia, for appellant.
Solicitor John Foard and James L. Felder, both of Columbia, for respondent.

LITTLEJOHN, A. J.: The defendant, John Hall Cannon, was tried by a jury and found guilty of murdering his four-year-old half-brother, Edward Holbrook Wyman, Jr. He has appealed, alleging that the judge committed error in admitting his confession into evidence; in ruling that the State's medical witness was qualified to testify as an expert as to the defendant's sanity; and in charging the M'Naghten rule to the jury as a test for determining legal sanity.

The defendant is eighteen years old and lived with his grandmother at Conway. His father, O'Neil Cannon, also resided at Conway. His mother, who was divorced from the defendant's father, lived about 125 miles from Conway in Columbia and was married to Edward Holbrook Wyman. On Friday morning, November 26, 1971, the maid

employed by the Wymans found the dead bodies of the defendant's mother, the defendant's step-father, and the defendant's half-brother. All had died of pistol-shot wounds. Young Edward was found dead in the lap of his deceased father in a chair in the den; the body of defendant's mother was found on the floor in the bathroom; apparently they died Wednesday night. The matter was reported to police authorities and an intense investigation was begun.

We treat first the first question raised by the appellant, which, as copied from his brief, reads as follows:

"DID THE COURT ERR IN ADMITTING INTO EVIDENCE DEFENDANT'S CONFESSION SINCE THE CONFESSION HAD BEEN OBTAINED BY SUBTERFUGE AND THE USE OF UNLAWFUL PRESSURE IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES?"

A summary of the circumstances surrounding the defendant's arrest and subsequent interrogation is necessary to a disposition of this question. He was arrested shortly after attending the funeral of his mother on the 29th day of November. The arrest was made on a highway leading from the funeral area by two officers of the Richland County Sheriff's Department. They took him to the headquarters of the South Carolina Law Enforcement Division (SLED), arriving at about 5:45 in the afternoon. He was interrogated for a short period of time by police officers, Lt. Wyndham, Lt. Faulk, Capt. LaVerne, Capt. Gasque, and Sheriff Powell. The record fairly indicates that the questioning was conducted in a temperate manner. The defendant was then taken into the office of Lt. Faulk for about twenty minutes. The record is not complete, but the defendant was examined by the use of a polygraph machine. The defendant continued to deny his guilt during these sessions. After about twenty minutes, Lt. Faulk left the office and Lt. Wyndham and Capt. Gasque entered to continue

questioning the defendant. It was during this twenty minute session that the defendant first gave a statement indicating that he had committed the fatal shooting. Subsequently, Sheriff Powell and Capt. LaVerne talked to the defendant for about fifteen to twenty minutes and he again made statements amounting to a confession.

Thereafter, the defendant was taken to an outer office where his statement was reduced to writing and subsequently typed by a secretary. As the defendant once more repeated his confession for transcribing, there were four police officers present. The process of receiving his statement, typing and signing it, took approximately an hour and a half. Total time spent at SLED Headquarters was approximately five and one-half hours, ending about 10:15 in the evening. The signed statement included the following:

> "I have been advised that I have the right to remain silent and anything I say can and will be used against me in a Court of Law. I have been advised that I have the right to talk to a lawyer and have him present when I am being questioned. I have been advised that if I cannot afford a lawyer that the State will appoint one to represent me without cost. I have been advised that any time during the questioning if there is any particular question I do not want to answer that I do not have to do so. I have been advised that I can terminate the questioning at any time by saying that I do not wish to answer any more questions. I understand these rights and I waive these rights and I make the following statement."

The confession was somewhat detailed and need not be repeated verbatim. In it, he stated that he had bought a pistol in Conway and had practiced target shooting with it. He drove to Columbia on Wednesday, November 24, 1971, and went to the home of the now-deceased trio. He admitted shooting his four-year-old half-brother (as well as his mother and step-father) and then drove to Conway. The next morning, he carried the .22 pistol, which he had

used to do the shooting, and threw it into a sewage lagoon behind the Conway Mall on Highway U. S. 501. Later, officers recovered the pistol from the lagoon and it was identified as being one purchased by the defendant in Conway.

The defendant does not question the timeliness of a *Miranda* warning, but does challenge the sufficiency of such and the adequacy of the waiver of rights as described in *Miranda*. The evidence indicates that the following warning was in essence given to the defendant at the time of arrest and at least three other times throughout the interrogation by different officers:

> "You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one."

Defendant contends that the initial warnings were insufficient and incomplete; he argues they should have included, as did the warning included in the typed statement, in effect the following:

> "If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering at any time or until you talk to a lawyer."

We do not agree that Miranda v. Arizona, 384 U. S. 486, 86 S. Ct. 1602 (1966), required the inclusion of the above when informing a person of his rights. We cite three cases holding such: State v. Jones, 196 N. W. (2d) 606 (Minn. 1972); Flannagin v. State, 266 So. (2d) 643 (Ala. 1972); Watts v. State, 262 So. (2d) 630 (Ala. 1972), and specifically point with approval to the reasoning of the *Flannagin* case. See also 3 Wigmore, Evidence, § 826 (Chadbourn Rev. 1970).

The defendant also submits that even if the warnings be deemed sufficient, he did not freely, voluntarily and know-

ingly waive his rights. The trial judge held an out-of-the-presence-of-the-jury hearing in which the State and the defendant were permitted to meet this issue. Among those testifying was the defendant himself. He admitted that the statement was basically correct. After hearing the testimony, the trial judge said, prior to admitting the confession into evidence:

> "We are convinced beyond a reasonable doubt and we so find that the confession or statement obtained from the defendant was freely and voluntarily given and that the same was given without duress, without coercion, without undue influence. We further find that the defendant was advised of his Constitutional rights, the right to have an attorney present with him during the interview, the interrogation, that the Court would appoint an attorney for him if he was without funds with which to employ one without cost to him, that he had the right to remain silent, he had the right to terminate the interrogation at any time and not to answer any questions. We further find that the defendant knowingly and intelligently waived such rights under the 5th and 6th amendments to remain silent and have counsel present with him at the interview and interrogation."

Notwithstanding the Miranda court's effort to particularize and to prescribe specifics for valid waivers, in resolving issues of waiver vel non, courts must make inquiries concerning the totality of circumstances. It is clear that the totality of the circumstances surrounding the admission of the confession was explored by the trial judge. Both the State and the defendant were permitted to introduce evidence out of the presence of the jury to their own satisfaction. Every case must be decided on its own merits, based on the totality of the circumstances.

The record fairly indicates that not only the initial questioning, but all of the interrogation was conducted in a relaxed and conversational manner. The fact that the defendant was eighteen years of age and had an eleventh

grade education is certainly a consideration, but the record reveals that the police used a very temperate manner in questioning him. It is fair to say the record reveals the police made a conscious effort to refrain from taking undue advantage. The defendant argues that he was intentionally separated from his father and that this tended to show excessive coercion. The record is simply void of any implication that the defendant desired the presence of his father and there is at least some evidence that the defendant's father had no wish to see his son.

The number of officers and the intensity of the interrogation is questioned. This is indeed a factor, but as previously discussed, the conduct of the officers was exemplified by restraint and courtesy. The fact that a polygraph examination was used is another valid consideration in the totality of circumstances. The record is very sparse as to the circumstances surrounding the use of the polygraph.

The defendant also vigorously argues that Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274 (1960), even without the other considerations, controls and demands a finding that the confession was inadmissible. We do not think *Blackburn* controls.[1]

The difficulty of the task of weighing these factors is illustrated by this case. The State has shown that five experienced police officers interrogated a willing defendant, singularly or in groups of two, for some two hours before his first confession and it was further shown that such interrogation was not aggressive, leading and comprehensive in nature, or intense and coercive in atmosphere. The record shows the officers to be keenly aware of the defendant's rights, and shows a conscious and continued effort by the officers to insure that the defendant was equally aware of those rights. The record fairly indicates that throughout interrogation the defendant was repeatedly

1. In *Blackburn*, the medical testimony was so compelling that it established the strongest probability that the defendant was mentally ill and thus conclusively demonstrated the involuntariness of the confession. In this case, a finding that the defendant was insane or mentally ill is by no means compelled.

warned, and after each warning again showed a willingness to answer questions. Most important, he was asked if he wanted to talk with the questioning officers. He answered that he did. The use of the polygraph would not in itself show involuntariness. United States v. McDevitt, 328 F. (2d) 282 (6th Cir. 1964); Thompson v. Cox, 352 F. (2d) 488 (10th Cir. 1965). The record indicates that the result of the polygraph test was a continued denial by defendant of any connection with the murder. What influence the polygraph had on the defendant's decision to confess is at best speculation. In this case, we find nothing in the use of the polygraph that was so coercive as to have overborne the defendant's will to resist.

We cannot say that the trial judge erred in admitting the confession into evidence for the jury's consideration.

After ruling that the confession was free and voluntary, the trial judge charged the jury that it could still disregard the same unless it, the jury, was convinced "beyond a reasonable doubt that such confession was freely and voluntarily made, without any threats or inducements addressed either to hope or to fear. It is your duty to determine from all the evidence before you whether the State has established beyond a reasonable doubt that any such confession was in fact freely and voluntarily made." Obviously, the jury, as well as the judge, concluded that the procurement of the confession was not improper.

The second question raised by the defendant, as quoted from his brief, is as follows:

"DID THE COURT ERR BY PERMITTING THE STATE'S WITNESS, DR. ROLAND BEIREN TO CONTINUE HIS TESTIMONY AS AN EXPERT WITNESS SINCE THE COURT SHOULD HAVE TAKEN JUDICIAL NOTICE OF THE STATEMENT OF THE WITNESS THAT ADOLESCENT PSYCHIATRY IS A HIGHLY SPECIALIZED FIELD AND HE ADMITTED HIS LACK OF QUALIFICATIONS. DID THE COURT ALSO ERR IN REFUSING DEFENSE MOTION FOR A VERDICT *NON OBSTANTE VERE-*

DICTO, BASED LARGELY ON THIS WITNESS'S ADMISSIONS?"

The defendant argues that the testimony of State's psychiatrist, Dr. Roland Bieren, was incompetent and should have been excluded because he did not qualify as an expert. The record reflects that this witness is a graduate of the Medical School at the University of Maryland in 1936. He spent seven years post-graduate work at the University of Maryland Medical School and Hospital, and three years as a Navy doctor during World War II. Thereafter, he practiced obstetrics and gynecology. In 1967, he came to Columbia and took three years of training in psychiatry at the William S. Hall Psychiatric Institute, graduating in 1970. Since that time, he has been employed at the State Hospital for the Mentally Ill, as a psychiatrist. He was appointed as Chief Psychiatrist of the Court Psychiatry Services in 1971. He is a member of the American Psychiatric Association.

The testimony of this witness was used in reply after the defendant had psychiatrists testify as to defendant's mentality. It is argued that Dr. Bieren's testimony should have been excluded because he is not a specialist in adolescent psychiatry. The qualification of an expert witness is left largely to the discretion of the trial judge. The law does not require the best possible kind of witness, but only persons of such qualifications as the community reasonably relies upon in seeking medical advice. 2 Wigmore, Evidence, § 569 (3rd ed. 1940). Certainly, there was no abuse of discretion as relates to the admissibility of this witness' testimony and we find the exception without merit.

The last question raised by the defendant on this appeal, as taken from his brief, is as follows:

"DID THE COURT ERR IN REFUSING DEFENDANT'S REQUEST FOR A CHARGE TO THE JURY ON THE FEDERAL RULE AS TO INSANITY AS A DEFENSE TO A CRIMINAL CHARGE AND BY INSISTING ON THE M'NAGHTEN RULE AS A GUIDE IN THE CASE DENYING THE DEFENDANT HIS

RIGHTS TO EQUAL PROTECTION OF THE LAW AND DUE PROCESS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?"

By this exception, the defendant asks this Court to abandon the M'Naghten test as a means of establishing legal sanity. South Carolina has long used the rule. State v. Allen, 231 S. C. 391, 98 S. E. (2d) 826 (1957); State v. Byrd, 225 S. C. 593, 93 S. E. (2d) 900 (1956). It would serve no useful purpose in this opinion to rehash the merits and demerits of the M'Naghten rule. We are aware of the alternatives which some courts have adopted, but are not convinced that the other rules set forth a better formula for determining whether a person accused of crime should be excused because of his mental condition. It should be comforting to those who would attack the M'Naghten rule to realize that a layman jury, regardless of the rule recited, normally takes a common sense approach and determines whether the accused person is, first, guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be excused of the crime because of his mental condition. We adhere to the M'Naghten rule.

Having found that all exceptions are without merit, the judgment of the lower court is

AFFIRMED.

MOSS, C. J., LEWIS, BUSSEY and BRAILSFORD, JJ., concur.

TESTIMONY OF DR. ORVIN

DIRECT EXAMINATION

By Mr. Kirkland:

Q. I believe you are Dr. George Orvin, are you not, sir?

A. Yes, sir.

Q. I believe you are a psychiatrist, are you not?

A. Yes, sir, I am.

Q. Doctor, would you be kind enough to tell us where you are from?

A. Charleston.

Q. How long have you been living in Charleston?

A. Since the age of approximately two, having been born in Columbia, South Carolina and moved to Charleston at that age.

Q. So you're back home?

A. Yes, sir.

Q. And, Doctor, would you be kind enough, if you would, to give us the history of your background and training?

Solicitor Foard: Now if Your Honor pleases, I'm not trying to cut him off on that but I will stipulate that I know the doctor. He's qualified as a medical doctor, as a psychiatrist. I can't say too much for his motor course but otherwise he's all right.

Mr. Kirkland: I still want the jury to have the benefit of his doctor's training because it might be vitally necessary later.

Q. Doctor, where did you attend school?

A. I graduated from the public schools of Charleston. I'm a graduate of The Citadel, class of 1943. I attended the Medical College of South Carolina, now known as the Medical University of South Carolina, and received my M.D. Degree there in 1946. At that time I went to New York City and I worked as an intern at Knickerbocker Hospital in New York City.

Q. What hospital is that? Speak up so the solicitor can hear you.

A. Yes, sir, the Knickerbocker Hospital in New York City. Following that I returned to Charleston and did general practice for about nine years as a family physician and then went back to the Medical College of South Carolina and took my training in

psychiatry. Having completed that, I went to the University of London in England and spent a year there as clinical assitant on the children's service at the Morserly Institute of Psychiatry, University of London. Having completed my training there with children and adolescents, I returned to the Medical College of South Carolina and was appointed to the faculty. Presently I hold the academic rank of associate professor of psychiatry and I am the chief of the adolescent psychiatric service of the Medical University of South Carolina. I'm a diplomat of the American Board of Psychiatry.

Q. This is what I want to know. When you say you are a diplomat of the American Board, do you have to take certain examinations and certain qualifications to be a diplomat?

A. Yes, sir. Yes, sir, special examinations given by the American Board of Psychiatry for qualifications. I'm a fellow of the Royal Society of Medicine. I'm a fellow of the American Psychiatric Association. I'm a fellow of the Southern Psychiatric Association and a member of several others.

Q. And, Doctor, let me ask you this. Are you familiar so we'll get it down and get it straight, are you familiar with the M'Naghten Rule?

A. Yes, sir, I am.

Q. Do you know the history of the M'Naghten Rule?

A. Yes, sir.

Q. Do you know how the M'Naghten Rule first came into existence?

A. I have knowledge of it, yes, sir.

Q. Did you write articles on the M'Naghten Rule and have you studied it as a specialty?

A. I have, sir.

Q. Would you be kind enough to give us the bene-

fit of how the M'Naghten Rule originated and the facts surrounding it?

Solicitor Foard: Now if Your Honor pleases, it's all very interesting . . .

The Court: Excuse me. I don't appreciate the relevance of that to this inquiry.

Mr. Kirkland: Your Honor, I believe it would be for the purpose, we've got an expert and the solicitor keeps talking about the M'Naghten Rule. I think it would be good for the jury to know how it even came into existence and what the surrounding circumstances were.

The Court: We can't agree with you. That's a rule we comply with in this State. He may tell the rule but I see no purpose in giving a historical background of it.

Mr. Kirkland: Well, he was worried about the other one, understanding it. I want, Your Honor, not only that he understand it but the jury to understand the whole theory of it.

The Court: The Court will instruct the jury as to what the rule is.

Q. All right, sir, Doctor. Would you be kind enough to tell me this then, sir. This young man . . . would you do this for me? Would you tell me is there a certain reason for specializing in the field of adolescent psychiatry?

A. Oh, yes, sir.

Q. Well, let's take psychiatry as a general overall practice. Tell us the different fields that there are specialties in?

A. Well, of course, basic division along chronologic age, as you well know, we have positions, psychiatrists, who treat adults. We have other psychiatrists who undergo special training to treat children and we have

some who are trained to treat the adolescent. Some adolescents are treated by the child psychiatrists. The problem involved in evaluation between the adult and the child and the adolescent revolves around the capacity of an individual to sit and talk. You and I if we went to a psychiatrist we could sit down and we could say to the psychiatrist this is what's bothering me, I'm worried about my children or I'm worried about my husband, whatever the problem might be. A little child can't come into the psychiatrist's office and sit down and say, doctor, here's my problem, but he does in some ways speak to the psychiatrist if the psychiatrist can understand what the child is saying. And the language that a child uses are not words but actions and behavior. You look at your children or other children playing and they play sort of games, these are symbolic games that have some involvement in it. Many of them have sort of qualities of life learning experiences involved in them and if you take a little child and put him down with a set of toys he'll play with those toys in such a fashion that a skilled observer can draw certain conclusions about that child. For instance, the child who takes a little group of family dolls and every time she plays with it consistently takes the father doll and tears his hand off, one simply wonders how she feels about her father; one certainly can see how she feels about the doll. It doesn't necessarily follow but these are things that gives the psychiatrist a lead. Now it would be unheard of to ask an adolescent to please get down on the floor and play with some toys so you can watch his behavior. He wouldn't do it but he cannot come into the psychiatrist's office and say, doctor, here's my problem, my mother and my father have been giving me a hard time lately. He can't do that. He has a great problem at

this age. If you will recall your own adolescence of being able to talk. Oh, they can sit and talk to one another, the adolescent. There are even times when they can't do that. But when you ask an adolescent to speak to an adult, one of the first things he does is try to figure out what you want to hear. That's the first thing he tried to do. He's been told since he was this age don't talk to me like that. He's been told, you know you mustn't be disrespectful, no matter what you feel you must tell me, what I approve of. So the adolescent whereas he might speak to you with words, they don't always necessarily reflect what he really thinks or what he really feels. Sometimes he'll sort of play the patient for you and if one is not on guard so to speak, if one is not trained for that, if one is accustomed really to dealing with the adolescent as one deals with adults, he's headed for trouble. I think those adults can understand in trying to deal with the adolescent it is difficult to sort of deal with them on an adult basis, even though that's what he wants. So it requires a degree of expertise, a degree of special training and understanding to try to understand what the adolescent is really saying and what he really feels.

Q. What do you use along with the conversation to observe an adolescent, Doctor?

A. Would you repeat that question?

Q. I said what do you usually do along with just merely, with just talking? What else?

A. One has to observe what the adolescent is doing. Sometimes it's really necessary to sort of look at the adolescent upside down and backwards because many times the things he does do not make sense if one uses an adult logical understanding. If you as an adult sometimes try to understand the adolescent, the problem is, of course, that you are going to use adult logic

and that's going to defeat you right away. Sometimes it's necessary if you are going to really understand the adolescent to reverse some of the things he says to be able to see through some of the things he says, to look for some of his actions, some of his behavior speaks to you.

Q. Now, Doctor, do you specialize in this field in particular?

A. Exclusively, sir.

Q. So this is your exclusive field?

A. Yes, sir.

Q. Now this defendant over here, Mr. Cannon . . .

A. Yes, sir.

Q. . . . what is his age, Doctor?

A. I beg your pardon?

Q. What is his age?

A. His age, he's 17, just turned 18 I believe, sir.

Q. Doctor, is he in the adolescent stage of life?

A. Emphatically.

Q. Now, Doctor, did you have an occasion and when was the first occasion that you had to see Mr. Cannon, young Mr. Cannon?

A. April 12, 1972.

Q. Now, Doctor, I ask you, are you here as a general practicing psychiatrist? Are you here representing your college or your institution? Are you here testifying as to your knowledge of this case?

A. I'm here testifying as a professionally trained individual with my own personal knowledge of this case.

Q. Doctor, are you being compensated for coming here, sir?

A. I presume I will, sir, somewhere along the line.

Solicitor Foard: I hope you are not depending on him, Doctor.

A. Somebody is going to pay me, sir.

Q. Will you be compensated for the work that you did at the medical college?

A. Yes, sir.

Q. Who will receive the benefits of that compensation at the medical college?

A. The Medical University will receive that, sir.

Q. So that is not coming to you, sir?

A. No, sir.

Q. What you are meaning, you'll be paid for coming to attend and driving up here?

A. Yes, sir.

Q. All right, sir, as all expert witnesses usually are?

A. Yes, sir.

Q. Now, Doctor, would you be kind enough to tell us how long on your first visit and just tell us how long you had to go into this matter with young Mr. Cannon and to what extent did you explore this matter?

A. Well, I'll answer that, Mr. Kirkland, in the sense that you've asked a question about the units of time that I spent with him. I would submit to you that that, sir, is not really the essential point. The quality of the time that's spent...I might have spent eight hours with him and talked with him about baseball games and not have accomplished what was needed to be done. As a matter of fact, I spent four hours with him.

Q. Now, Doctor, did you have the matter of the statement and everything that he had given to the police officials in regards to this offense?

A. I have a great deal of information here, Mr. Kirkland. When I see a patient, I generally speaking know something is wrong or he wouldn't be in my office. I prefer to not be biased in advance if I possibly can avoid that. I prefer to try to talk with, and in particular to talk with the adolescent, I prefer to usually

talk with the adolescent before I talk with his parents for instance because I want my mind to be unbiased and if I'm not careful I'm going to be prejudiced in behalf of parents and I'm liable to look at things through a parents eyes. So I make a point of trying to see my adolescent patient as completely unprejudiced and unbiased as I possibly can.

Q. Doctor, did you see this patient with any previous knowledge of any background from me or anyone else?

A. No, sir, I had only my own knowledge that I gained from Mr. Cannon when I examined him.

Q. All right, sir. Now, Doctor, would you be kind enough to tell us what the M'Naghten Rule is, sir?

A. M'Naghten Rule?

Q. The M'Naghten Rule. I believe it's M'Naghten, isn't it?

A. Yes, sir. As I understand the M'Naghten Rule, it's a legal test for what has been referred to as insanity, which in itself is medically an incorrect term, the use of the word insanity. But as I understand the M'Naghten Rule, it simply is a way of determining an individual's legal sanity. It's a legal yardstick that's applied to I suppose a client would be the best way to put it because it isn't put to a patient in the sense that it's a medical yardstick. It's not based on medical observations or medical opinions but on legal observations and legal opinions. As I understand it, it says essentially that the individual who is being tested knows the difference between right and wrong, knows what he's doing and knows the consequences of his acts. Now one of the problems involved is for the physician in understanding this particular rule is the fact that it deals mostly with . . . if you'll listen to what it says . . . he knows right from wrong, he knows what he's

doing and he knows the consequences. We can program a computer to do the exact same thing. The problem that's involved is that it deals only with the knowledge of certain basic facts. The M'Naghten Rule does not say anything about how does he feel about people, does he hate people or does he love them. It does not deal with that, just as the computer doesn't deal with whether it likes you or not when it sends you a letter mixed up that you shouldn't have gotten. But because people have something more . . .

Solicitor Foard: Your Honor, I hate to interrupt this witness. I don't mind him telling the jury what his opinion or what the law is but now he's getting into some critical atmosphere of the rule.

The Court: Yes, sir. Well, of course, his comments are not responsive to the question anyway so suppose you ask your next question.

Q. Doctor, using the M'Naghten Rule as such, did you examine this patient from the standpoint of knowing the M'Naghten Rule at the time? Did you examine him having full knowledge of the M'Naghten Rule?

A. I examined him with the knowledge of the M'-Naghten Rule, yes, sir.

Q. Did you examine him at length, sir?

A. Do what?

Q. Did you examine him at length in questioning?

A. Yes, sir.

Q. Doctor, do you feel that it's necessary that you have the full knowledge of all the facts surrounding in order for you to make a proper diagnosis?

A. I make my diagnosis based on my observations of the patient and the patient's responses to me.

Q. The statement that was given to you or the statement you have that was furnished to the police depart-

ment, did it in any way assist you in understanding this situation?

A. I read the defendant's statement but after I examined him, not before I examined him. I did not... I purposely avoided reading the statement concerning what he had done before I examined the patient. I couldn't completely give an unprejudiced view I thought.

Q. So you waited until after you examined him?

A. Yes, sir.

Q. All right. Now, Doctor, after you had examined him and after you went through all the necessary, did you reach a conclusion so far as this defendant is concerned as to whether he was mentally sick or not?

A. Yes, sir. I concluded that Mr. John Hall Cannon was at the time of my examination mentally ill and had been mentally ill I would attest for the past two to three years, possibly four years. I think Mr. Cannon has been ill throughout that time and has maintained only the most tenuous grasp of reality that simply shatters and fractures under all sorts of stress, the slightest kinds of stress. I think Mr. Cannon is mentally ill right now today this morning in this courtroom, sir.

Q. Doctor, do you feel that Mr. Cannon is sane or insane under the M'Naghten Rule?

A. Under the M'Naghten Rule, I think he's insane if I may use that term to...

Q. Well, that's the word of the M'Naghten Rule, isn't it?

A. Yes, sir.

Q. Now, Doctor, there was some question about the psychologist and the Rorschach test. Would you tell me what part in the matter of the Rorschach does a psychiatrist use it? How does it fit into your overall picture of diagnosing one's condition?

A. Many times a psychiatrist isn't that privileged to have that available to him and he works under a disadvantage under those conditions. It can be done, it certainly can, but as the cardiologist must have an EKG, electrocardiographic tracing, and as the chest specialist needs a chest X-ray in order to really understand what's going on inside of his patient, the psychometric examination of a patient helps me with my clinical judgment and my knowledge of the patient and the information gained by the psychologist helps me to conclude my diagnosis.

Q. Doctor, in order for one to properly examine this defendant, do you feel that it would be necessary for him to be qualified as a specialist in the adolescent field?

A. I think he could be examined by any number of people, Mr. Kirkland. The question as I see it revolves around the difficulties of examining this particular sort of patient without certain experiences.

Q. And in your opinion, what is your opinion as far as his condition is concerned?

A. Would you repeat that again, I'm sorry?

Q. I said what is your opinion to his condition, his mental condition?

A. I think Mr. Cannon is mentally ill.

Q. Doctor, does one have to be... perhaps this might be a little livid... a rip-roaring idiot to be mentally sick under the M'Naghten Rule?

A. Does he have to be what?

Q. A rip-roaring idiot.

A. No. Again this is one of the difficulties in trying to establish the question as far as physicians are concerned, that in trying to help others understand what we mean by mental illness, the person who is mentally ill, he's going to look like you and he's going

to look like me. He's not going to froth at the mouth and scream and rage and run around and bite people on the neck. He's not going to stand up in a public room and pull off his clothes. He will conduct himself in a fashion frighteningly like you and like me. So it becomes quite difficult because I could walk most of the jury through my ward or through the adult ward and if you didn't know that you were on a psychiatric ward you might not know that they were mentally ill. It defies skilled examinations at times.

Mr. Kirkland: Thank you, Doctor. Answer any questions that the solicitor might have.

CROSS EXAMINATION

By Solicitor Foard:

Q. I'm glad that you didn't say it might look like me and Henry, I feel better.

A. I said me or the jury.

Q. Doctor, I realize that intelligence is not necessarily an element in determining the sanity under the M'Naghten Rule but of course if you were an idiot you would have to be insane, I mean, you know, if your mind was such that you couldn't comprehend anything. Of course, under that rule you would be insane.

A. Well, there are two conditions. There's one that's called propf-schizophrenia which means a person who is an idiot and has schizophrenia, which is a separate condition from what we are talking about with Mr. Cannon.

Q. I mean if you went to the extreme of not a moron but an idiot where just real pathetic situation, it wouldn't . . . in other words, so low in intelligence that he wouldn't know that it was against the law or that, kind of like an animal sort of a thing. In other words, if you had the mind of a, I don't know how low

I.Q.'s can go, but you could be stupid that that's the reason you're insane.

A. You could be so stupid that you could be really unable to retain factual knowledge. One would be on dangerous ground in saying this person is insane because if I can go back to that problem involved, the term insane means no senses and that's where the problem comes in because even a person who is mentally ill, he couldn't be mentally ill without mental, if he doesn't have a mind he couldn't get sick. But to use the word insane means he doesn't have a mind. So it's a misleading thing but I think if I understand, Mr. Foard, you are saying that there are people who are severely impaired intellectually, yes, sir, and it's difficult to teach them. You can teach them that it's wrong to hit sister and you can teach them that and he goes back and does it over and over and over because it's hard for him to carry over and to intellectually keep in his mind, his memory is going to be impaired, his attention span is going to be impaired.

Q. Now there's no question that John Cannon knows today that it's against the law to take a pistol and shoot somebody, doesn't it? He knows that?

A. I don't know that he does, Mr. Foard.

Q. Did you ask him any of those questions?

A. Yes, sir. Yes, sir.

Q. Did you ask him whether he knew it was against the law to kill somebody?

A. Yes, sir.

Q. What did he tell you?

A. He said he did.

Q. He said he did?

A. Yes.

Q. So you've got no reason to doubt it.

A. Yes, sir, I sure have, sir. He said he was also the smartest person in the world, and I doubt that, sir.

Q. But a lot of people brag, don't they, Doctor?

A. Yes, sir, but there's a certain . . .

Q. You heard me and Mr. Kirkland brag.

A. This was not bragging I'm afraid. Mr. Cannon's problem wasn't that, sir.

Q. Well, you've got a South Carolina driver's license, haven't you?

A. Yes, sir.

Q. You are a South Carolina driver?

A. Yes.

Q. And they asked you legal questions, didn't they?

A. Yes, sir.

Q. And they asked you how fast you can drive on a super highway. Now if he's got a license, he had to pass that test. It wasn't just a question of yes and no, it's a question of knowing that a certain speed limit is a certain part of the city so he has that information, he says in a certain area you can go 35 miles an hour, if he gets it correct.

A. Yes, sir.

Q. And so while he might not appreciate the law surely he knows that there are laws stating on the criminal side that you can do and can't do certain things.

A. That's the answer, he knows that, sir.

Q. Sir?

A. There are times when he knows that.

Q. And also he knows whether he agrees with it or not, that it is morally wrong to kill someone?

A. Not by his morals, sir.

Q. Well, would you say he has bad morals?

A. Yes, sir.

Q. Actually he's kind of what you might call a spoiled brat, isn't he?

A. No, sir, I think that a lot of help was made in that direction to do so.

Q. That's what I mean.

A. I mean I think a lot of things happened to the fellow that would lead in that direction but I'm not sure what the word spoiled means really. I think that it means that it's rotten or turned up bad I'm not quite sure about it. He's been indulged, Mr. Foard, excessively.

Q. And, Doctor, you I have both been spoiled so we understand that definition, but if the statement is correct and of course we don't really know that it is, but this is the statement that he signed and he said this is true. He was asked during the past twelve months how many automobiles have you had and he listed seven automobiles and so-forth; I assume his grandmother bought for him.

A. Yes, sir.

Q. That would be someone either giving in or trying to spoil him, wouldn't it?

A. One would think so. One would think so.

Q. Yes. So he knew how to go in maybe with somebody else's money and buy an automobile and there is some evidence in this case that you may or may not be familiar with that he went to a store in Conway which I understand his people have an interest in and purchased that pistol sitting there. This is the bill of sale that he did not make out but he signed and bought it.

A. Yes, sir.

Q. And either on the 21st or 24th, I'm not sure which, of November he took this pistol out in the country, he bought his bullets somewhere else and he tar-

get practiced. Wouldn't that indicate he knew something about the law?

Mr. Kirkland: If it please Your Honor, he's using other witnesses as the basis . . . you and I know if he wants to put in a hypothetical question he can but that is taking one witness you might say and pitting it at another one or referring.

The Court: I think the witness can answer the question he asked.

Mr. Kirkland: I'm sure he can but I want the record to reflect that this is what he's doing.

Q. Well, assuming for discussion that that happened, Doctor; in other words, assuming that he did go in and buy the pistol, that he did charge it, that he did sign his name and assuming that he went out and target practiced before he came over to Columbia some two or three days later, wouldn't that indicate that he knows something about the law?

A. To my way of thinking it would indicate he knows something about target pistols or shooting, or I think he's able to practice and to carry that out and to understand that he was shooting a gun.

Q. And after this killing was over and assuming that it happened this way and he drove back to Conway and assuming that he hid the pistol under a pillow and assuming that the next day he went to this, where the sewage reservoir of Conway is and threw it in there, wouldn't that indicate that he at that time was trying to conceal a weapon, to conceal the crime he committed?

A. I would think that he was certainly trying to conceal the weapon and you stated that the crime is a matter of record, so if there's a logical connection between the gun and the crime then I presume that he had some reason for hiding the gun.

Q. Well, let's put it that way. Suppose that State's Exhibit N . . .

A. Yes, sir.

Q. . . . which is a 22 pistol, suppose that he walks into his mother's home and he kills three people and then he gets in his car and he drives back to his home and it's late at night, he hides the pistol, the next morning he throws it into a sewage disposal plant, couldn't you conclude that he's trying to hide the weapon that he used so that the police won't ever find out who killed them?

A. I would presume he was trying to hide the gun and one might speculate as to why, whether it was that or whether he didn't want God to see the gun or whether he didn't want the devil to see the gun. The . . .

Q. Why would he not want God to see the gun?

A. It could have been any number of reasons. It might be very well that he's in touch with God daily on a verbal language.

Q. And he knows it's a God?

A. I'm not speaking of necessarily the way you know God.

Q. Well, the way he knows it. Let's talk about the way he knows it. He could be hiding it from the police, he could be hiding it from God, you say, he could be hiding it from the devil.

A. Could be hiding it from you. He could be hiding it from, you know, the fairies that are watching him every night as he goes to bed. I can't speculate as to what his fantasies were at that particular time. I'm surprised that he didn't do more than he did. It's quite usual that schizophrenic psychotic patients having committed murder usually do try to hide the weapon and usually do try to get away and escape.

Q. Because they don't want to be found out? They don't want to be found out?

A. I don't know. I only know that it's not unusual for a schizophrenic patient to hide weapons or to try to leave the scene.

Q. I'm listening, Doctor.

A. Yes, sir.

Q. If we can assume for illustration that he was sane and he went into that home and killed three people, it would not be unusual for a sane person to have driven back home, hid the pistol and then thrown it in a septic tank. It would be nothing unusual about a sane person doing that, would it?

A. I suppose not, sir.

Q. So, Doctor, you can't really say then that he didn't know it was against the law to kill these people?

A. Yes, sir, I can say that.

Q. Then why can't you tell me why he was hiding that pistol after he killed them?

A. I can't tell you that, sir.

Q. Most criminals try to conceal a crime . . .

Mr. Kirkland: Of course, Your Honor, that's not a question. That's a statement and it's argumentative, most criminals.

The Court: We agree with counsel. I sustain his objection.

Q. Well, whether he was sane or insane when he took that pistol and threw it where, into a nasty old septic tank he did what a normal person would probably have done under those circumstances.

Mr. Kirkland: Your Honor, that's argumentative. It's no question. This is an expert up here, he knows how to examine experts.

The Court: He may answer the question. Let's move on.

Q. Is that correct?

A. He did what a sane person would do, yes, sir.

Solicitor Foard: Thank you, sir.

Q. By the way, did you run his I.Q. or not?

A. No, sir.

Q. You didn't run his I.Q.?

A. No, sir.

Q. Now these tests that the psychologist, he brings you those results, doesn't he?

A. We discuss them.

Q. You discuss them?

A. Yes, sir.

Q. I mean you don't give the tests, you discuss them and you look at the results to help you make certain determinations?

A. Yes, sir.

Solicitor Foard: I see. Thank you, sir.

RE-DIRECT EXAMINATION

By Mr. Kirkland:

Q. Doctor, I just have one question. In your opinion, what was the condition of this defendant on the day of the crime?

Solicitor Foard: Now he's asked that four times. It's not in reply to anything.

The Court: He may answer it.

Q. What was his condition?

A. I think he was mentally ill at that time, sir.

Mr. Kirkland: Thank you.

RE-CROSS EXAMINATION

By Solicitor Foard:

Q. Was he mentally ill when he threw that pistol in the lagoon?

A. Yes, sir.

Solicitor Foard: Thank you, Doctor.

Mr. Kirkland: Come on down.

The Court: Thank you. You may step down.

A. Thank you, sir.

The Court: Mr. Foreman, ladies and gentlemen, you all please retire to the jury room for a short while.

Jury leaves the jury box.

The Court: Mr. Kirkland, as I understand it, the defense will not offer any further testimony.

Mr. Kirkland: That's correct.

The Court: If you wish to present some evidence in the absence of the jury, you may proceed at this time. You have been sworn, you continue under oath.

DR. GEORGE ORVIN, having been previously sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Kirkland:

Q. Doctor, are you familiar with the Federal Rule, the rule insofar as sanity is concerned? I said are you familiar with the Federal Rule?

A. Yes, sir.

Q. Would you be kind enough to give us the benefit of the Federal Rule, sir?

A. The basic problem of the M'Naghten Rule in the application of determining culpability of a person involves the fact that we spoke a while ago that the testing of the individual is purely at a level of intellectual capacity, at a knowing level. And because of the fact that mental illness as well as emotional illness is so basically rooted in determinations that involve feelings. For instance, one of the characteristic symptoms of the illness of schizophrenia is the fact that the individual seems what we call flat, like a vessel that's empty, like a glass of champagne that's lost

all of its bubble after sitting out for a few days, the spark or effervescence is gone, and many schizophrenic patients are able to carry on college courses, to if I might say practice law and even psychiatry I suppose and have schizophrenia. So . . . in fact, many of the schizophrenic patients are brilliant people with very high I.Q.'s and almost pathologic at times memory, can remember the phone number that he had when he was a little boy five years old. So the knowing aspect of the individual might be quite in tact. The . . . my understanding of the medicine's position of wanting to include and indeed having in some of the Federal cases been allowed to make a determination as to whether this patient is ill or not ill and to have a physician testify more as a physician and less as a legal representation, to be provided with the ability to plead a case under the so called Durham Rule of being able to include more than just the knowing aspects of the crime but to be able to also include the feeling, emotional aspects. I can't give you the specific titles of the Act as to the name of the Act but the American Law Institute's recommendation of a model code for determination of the individual's culpability in commission of a crime would be to permit those persons who are duly designated as experts to make pronouncements as to the patient's illness and to make determinations as to whether the illness was able to impair his ability to hold to the right as well as know the right.

Q. Doctor, isn't one of the things the fact that one, a mental disease must exist under the Federal Rule? That's correct, isn't it?

A. Would you repeat that again?

Q. A mental disease must exist?

A. Yes, sir. It must have some bearing to the crime itself too as well as not only exist.

Q. A critical relationship between the two?

A. Yes, that's right.

Q. And it does not go to the question of right and wrong but as to the fact of the control of the person's emotions and act, is this not correct, Doctor?

A. Yes, sir.

Q. Now, Doctor, could you give us the basic difference between that and the M'Naghten Rule as you understand it, sir?

A. In the M'Naghten Rule the individual would have his disease process determined not by medical definition but only that aspect of him that involves the knowing part. The M'Naghten fails to take into consideration the individual's appreciation of a crime. It deals with the things that Mr. Foard was talking about. Some of the things that keep you and I from committing crimes are the feelings that we have about certain things that do involve moral judgments and in certain types of illnesses the individual's emotional life is so impoverished that he cannot restrain himself against commission of such crimes and under certain kinds of stress, to be specific the case that we deal with today, the defenses that are established in this young man can't really be measured very well by the M'Naghten Rule; but they are so fragile that under the slightest stress that some of the acts that can be committed under moderate amount of stress is such that the individual cannot resist.

Q. Doctor, under the Federal Rule, the rule that you elicit, would there be any question about this defendant in regard to that rule?

A. There would be no question about it, sir. He would be declared ill and there is a correlation, a crit-

ical correlation, between the disease that he has and the act that he committed.

Mr. Kirkland: I have no further questions.

CROSS EXAMINATION

By Solicitor Foard:

Q. Doctor, I don't know that I even need to ask a question. Really we are going into a different situation here. You used the word resist. Now you weren't trying to get that mixed up with irresistible impulse?

A. No, sir, because I think that's a misleading term.

Q. I heard you use the word resist. I didn't know. I didn't think you meant that. I just wanted to clear my own thoughts on that. When we get into some of these rules, while it may be a wide variance, it's also a fine line in defining what is insanity, what is mental illness and those things.

A. Yes, sir.

Q. In fact, I believe our legislature back when I was in the legislature changed certain terminology, like asylum was changed to State Hospital. I believe the word insanity is changed to mental illness, things of that nature.

A. Yes, sir.

Q. So to some extent we have been using some terms a little differently than what the law sometimes sets forth. You might say that a person's mental illness is mentally ill from a medical viewpoint but not from a legal viewpoint.

A. That's quite possible. And from the standpoint that a person might be mentally ill and still not commit a crime.

Q. Did you say that John, that Cannon was a schizophrenic?

A. Yes, sir.

Q. What about paranoid?

A. I agree with that. I think he's paranoid schizophrenic.

Q. Schizophrenic paranoid. It is possible for a person to be a schizophrenic and go into a state of remission.

A. Remission, yes, sir.

Q. Remission.

A. It's a meat question about cure. I believe you are trying to avoid that term.

Q. Well, for example, you've got a patient, you assume that he or she is a schizophrenic or maybe schizophrenic paranoid, so in addition to various therapy you give that person medication?

A. Yes, sir.

Q. And frequently if they stay on that medication they can function in a reasonably normal manner?

A. Some can.

Q. And if they get off of that medication, that's when the problem starts?

A. They can have difficulties with it, yes, sir.

Q. In other words, do you have such a patient as a schizophrenic paranoid that you can never cure but you can control the situation with medication and maybe therapy?

A. Yes, sir. And the term cure should be taken guardedly I would say. I would say the term you used, remission, might be better. It's sort of like saying that a man has a heart attack and we can get him over that attack but we can't ever fix it so that we can say he never had one to start with. He can re-compensate so to speak.

Q. Or they will have another one?

A. That's right, sir.

Q. So even though we are talking about a different rule now when you talk about the M'Naghten-Rule as you say being a legal question of knowledge, it's almost impossible to determine what that person really knows and really doesn't know?

A. It's difficult. It's difficult for me as a physician to make a judgment that it really is a legal judgment. I feel some of the impotence that an attorney might feel if he were trying to utilize a medical diagnosis.

Q. I don't mean this as any reflection and the jury's not sitting here but number one, you are kind of against this M'Naghten Rule, aren't you?

A. I think... Mr. Foard, I think what I'm concerned about is that it isn't as complete as it ought to be. I think the State of South Carolina is...

Q. Got the wrong rule?

A. Well, yes, sir, I think it could be better. I don't mean that we lack justice in this State, I don't mean that, sir.

Q. And the... a human being, for lack of better terminology, you are inclined to say, well, this is close and I mean you are a little prejudiced when you... or I don't mean this particular person but when you are making that type examination...

A. That's why I have to make an effort to try not to be. I recognize that, yes, sir.

Solicitor Foard: Well, we appreciate your coming up, and I would suggest to you that you talk to Mr. Kirkland about your fee before you lose. Now you don't have to be insane or sane, just good intelligence tells you that.

A. Thank you very much, sir.

The Court: Any other questions?

Mr. Kirkland: No, sir, I have no other questions.

The Court: You may step down.

Mr. Kirkland: Your Honor, of course, I don't know if it's the proper time or at the proper time. I intend to ask the Court to charge the jury under the Federal Rule as well as the . . .

The Court: This is not the proper time.

Mr. Kirkland: I say at the proper time I'll make it.

The Court: Does the defense rest?

Mr. Kirkland: The defense rests.

The Court: We'll be at ease.

Defense rests.

Recess.

The Court: (At conclusion of recess) Bring the jury back.

Jury returns to the Jury Box.

The Court: The jury has returned.

Solicitor Foard: We are ready to proceed.

The Court: Does the defense have any other testimony to present?

Mr. Kirkland: No, sir, nothing further.

The Court: All right, sir. You may proceed, Solicitor.

Solicitor Foard: The State calls Dr. Bieren.

DR. ROLAND BIEREN, after being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Solicitor Foard:

Q. Dr. Bieren, would you state your full name for the record?

A. Roland, R-O-L-A-N-D (Spelled), E., E-S-S-I-G (Spelled), Bieren, B-I-E-R-E-N (Spelled).

Q. Doctor, would you briefly tell the jury the various, your educational background? I don't mean high school, start in college and university . . .

A. I graduated from the Medical School at the University of Maryland in 1936. I spent seven years in

post graduate work at the University of Maryland Medical School and Hospital in medicine, surgery and gynecology. Then I spent three years as a navy doctor in the second World War doing general practice in the navy. When I got out of the navy, I spent one year in research and then I went into private practice and spent ten years working as a gynecologist for a large group practicing as the group health association in Washington, D. C. At the end of ten years, I left them and went into private practice and practiced obstetrics and gynecology and some general practice. In 1967 I gave up my practice and came to Columbia where I took three years of training in psychiatry at the William S. Hall Psychiatric Institute. I graduated from that program in July of 1970 and since then I've been employed by State Hospital as a psychiatrist. July of 1971 I was appointed as Chief Psychiatrist of what we call the Court Psychiatry Service. This is a forensic type of service in which I get all of the alleged criminals, prisoners, who are sent in to see if they are mentally ill or not and they are sent in for periods of observation. I belong to several professional organizations. I was certified in obstetrics and gynecology in 1947. I became a fellow of the American College of Surgeons in 1950. I became a fellow in the American College of Obstetricians and Gynecologists' in 1959. For the last five years I was in practice in Washington, D. C. area I was associate clinical professor at the George Washington University and since I've been in psychiatry I've become a member of the American Psychiatric Association. I am licensed to practice in South Carolina.

Q. Most of the people you examine are placed at a State Hospital by a Court? Most of those that you examine are put there by the order of some Court?

A. That's right.

Q. And among other things I believe you say you examine many people under criminal charges?

A. That's correct.

Q. Now where are most of the people examined? Where is the location of the hospital that these people have their examination?

A. We have two male wards located on the campus on Bull Street in the Cooper Building. Each of those wards contains about 20 beds. Then we have a male ward in the penitentiary in the Stoney Building or Stoney Unit. This is a new hospital, a new psychiatric evaluation hospital which just opened about two years ago. The female patients we get, we do not get too many, and we usually admit them on a general psychiatry ward with other female patients who are not under Court order. So all together we have . . .

Q. Excuse me, go ahead.

A. Approximately at any one time between 70 and 90 individuals that are under observation for various and sundry reasons.

Q. Now, Doctor, would you open your file and see if you have a copy of the Order committing this defendant to the State Hospital for observation?

A. Yes, sir.

Q. What's the date of that Order?

A. November the 30th, 1971.

Q. Now, Doctor, was the defendant given a physical examination?

A. Yes, sir.

Q. Would you tell us generally or in a summary way what those examinations were, consisted of?

A. You want me to tell you what the physical examination is?

Mr. Kirkland: If it please Your Honor, what ex-

aminations he might have given, not some other examination, Your Honor. I'd have to object to that.

The Court: Well, he's asking what examination he gave him. He can give him, of course, the examination.

Q. What physical examination did you give him?

A. Well, I gave him a physical examination and a neurological examination.

Q. A physical and a neurological?

A. Yes, sir.

Q. Did you find anything basically wrong with him physically speaking?

A. No.

Q. All right, sir. Now on the mental situation, when did you first meet Mr. John Cannon?

A. He was admitted on the 30th of November and I first examined him on December the 1st.

Q. December the 1st?

A. 1971.

Q. How many times did you examine him or interview him in reference to the mental situation?

A. Ten according to the record.

The Court: Keep your voice up, please.

Q. Ten?

A. Ten according to the record.

Q. All right, sir. Did you determine what his I. Q. is?

A. The psychologist determined his I. Q.

Mr. Kirkland: Your Honor, I object to anything someone else might have done. I just want what this doctor did.

The Court: Will your psychologist be here? Is he going to testify?

Solicitor Foard: I hadn't planned on it. I could, I don't think it's that important.

The Court: We sustain his objection.

Mr. Kirkland: I'll let him go ahead and tell.

The Court: The objection is withdrawn.

Q. What was the reading?

A. 117.

Q. Will you briefly tell the jury the various tests that were given to Mr. Cannon?

A. You mean psychological tests or testing by myself?

Q. Both.

A. Well, we give a battery of psychological tests, the WAIS, the Rorschach, the human figure drawing and the Bender Gestalt.

Q. What test did you personally give him?

A. Well, a complete psychiatric evaluation consist of an initial evaluation by a psychiatrist, usually within 24 hours of admission, and then a history and physical and neurological examination, regular interviews at regular intervals throughout the period of observation, reports from the psychiatric nursing staff throughout the period of observation, routine laboratory test and X-rays, blood test, urinalysis, X-rays of skull and chest, electroencephalogram is done in this particular case. At the end of 30 day's observation or at the end of the observation period, it varies because in Federal cases it's more, at the end of the period of observation all of these tests are put together and the final examination is given by three psychiatrists, one of whom is myself, and a diagnosis is made at this time.

Q. All right. You made a diagnosis and drew certain conclusions, is that correct?

A. That's correct.

Q. I first ask you, what was your diagnosis of John Cannon?

A. Diagnosis with no mental illness.

Q. Would that also be your conclusion?

A. Yes, sir.

Q. Doctor, and I'll break it down a little bit now, in your professional opinion the times that you examined him, did he know the difference between right and wrong morally speaking?

A. Yes, sir.

Q. Did he know the difference between right and wrong legally speaking?

A. Yes, sir.

Q. Now we've heard today the terms schizophrenic. We've also heard the term paranoid. While you have in effect answered the question, I'll ask you specifically, in your opinion is John Cannon a schizophrenic?

A. No, sir.

Q. In your professional opinion, is John Cannon paranoid?

A. No, sir.

Q. I ask you now a hypothetical question. If John Cannon . . .

Mr. Kirkland: Your Honor, he can't use John Cannon if he's going to ask him a hypothetical question. He has to choose someone else.

The Court: Are you going to ask a hypothetical question? Ask one, sir.

Solicitor Foard: I'll withdraw it.

Q. If the evidence in this case shows that John Cannon . . .

Mr. Kirkland: Your Honor, he can't use the evidence in this case if he's going to ask a hypothetical question, Your Honor.

The Court: If you are going to ask a hypothetical question, that's what you said, ask a hypothetical question. Assume and then put the facts that you assume and ask the question.

Q. If an individual, male or female, went into a place of business on a Saturday before a Thanksgiving Day and purchased a 22 pistol, charged the pistol, and maybe a day or two or three later went out and target practiced with the pistol and within a day or two drove 80 or 90 miles and killed three members of his family at night and went back to his home town, 75, 80, 90 miles away, hid the pistol, got up the next morning and took it and threw it in a lagoon or septic tank, could you conclude from that set of facts that that person was trying to conceal the weapon and the crime that he or she committed?

A. Yes, sir.

Q. Now if a person is schizophrenic and such a person commits a crime, does he or she try to conceal the crime or not?

A. Most schizophrenics who commit crimes do not try to conceal the crime.

Q. Sir?

A. Most schizophrenics who commit crimes do not try to conceal the crime.

Q. Do not try to conceal the crime. If a person is paranoid, do they have to be schizophrenic?

A. No, sir.

Q. If a paranoid who is not schizophrenic commits a crime, would he or she, would they conceal the crime generally or not?

A. No, sir.

Q. If a person was both schizophrenic and paranoid, would they be likely to conceal the crime or not?

A. Well, of course, there are always exceptions but generally speaking, no.

Q. Generally speaking, no. In determining whether or not John Cannon knew the difference between right

and wrong legally speaking, what do you have to do to make that determination?

A. I have to determine that he knew the nature of the act, that he knew the quality of the act, that he knew it was wrong, and I'd like to add one other thing. I like to determine too that he's capable of, fully capable, of assisting in his own defense, he can help his lawyer prepare a defense for him.

Q. I believe you said you determined that he did know the difference?

A. Yes, he has to know the nature of the act, he has to know what he did, he has to know the quality of it and he has to know that it was wrong. He must know right from wrong.

Q. And how do you determine whether John Cannon knew and knows the difference between right and wrong morally speaking?

A. I determined that on the basis of my own observations, my own examinations and the answers that he gave to my questions during the time that I am with him.

Q. In your professional opinion, is there any question in your mind that John Cannon is legally sane?

A. None whatsoever.

Solicitor Foard: Doctor, answer any questions that Mr. Kirkland might ask.

CROSS EXAMINATION

By Mr. Kirkland:

Q. Doctor, so that we will understand each other, I want to be sure that what I ask you is fully in line with my duty as an attorney. Doctor, it would be safe to say that you are certainly qualified in the field as a gynecologist and in obstetrics or female disorders, isn't it?

A. Also as a psychiatrist.

Q. But I said it would be safe to say that because you did that most all of your professional life?

A. Oh, I did quite a bit of general practice too.

Q. Well, general practice. You had not had any study whatsoever other than what you got in medical school at that time, had you?

A. Oh, no, sir, I studied a good bit of psychiatry.

Q. Where did you study?

A. At the University of Maryland, George Washington University.

Q. Are you a fellow . . . are you a diplomat?

A. Not yet. I'm not eligible to take the boards until this year.

Q. You are not even eligible yet, are you?

A. I'll be eligible July 1st.

Q. So if I understand you correctly, you didn't even start, you did not become or start or become qualified even to complete your residency until 1970, did you?

A. That's correct.

Q. So in essence what doctors did you have that taught you in your residency?

A. Sir?

Q. What doctors did you have instructing you in your residency at the William Hall Institute?

A. You want me to go over the faculty?

Q. Well, let me ask you, have you ever done any specialty in the field of adolescent psychiatry?

A. Have I what, sir?

Q. Done any work in the specialty field of adolescent psychiatry?

A. Well, I worked under Dr. Stackenburg, who is a child psychiatrist. I worked under Dr. . . .

Q. I didn't ask you about a child psychiatrist, I ask

you about an adolescent. There is a difference, isn't it?

A. Well, adolescent psychiatry is a very highly specialized field of psychiatry.

Q. So you will admit it's a highly specialized field, wouldn't you, sir?

A. Yes, sir.

Q. And are you qualified in that highly specialized field?

A. I qualify as a general psychiatrist.

Q. I ask you, are you qualified in the highly specialized field of adolescent psychiatry?

A. Well, I don't believe there is such a thing as a Board of Adolescent Psychiatry.

Q. I didn't ask you that. I asked you are you qualified in the field and you said it was a highly specialized field, not me. Are you qualified in that highly specialized field of adolescent psychiatry?

A. Not specially qualified, no, sir.

Q. Doctor, I want you to tell me how many . . . can you tell me of a single solitary pure case of paranoid other than schizophrenic paranoid? Give me an example.

A. Well, I have one right now at the hospital.

Q. It is one that you would say is a paranoid that's not schizophrenic?

A. Yes, sir.

Q. Have you seen any others since you've been practicing in the field of psychiatric medicine?

A. No, sir, it's a rare condition.

Q. So in all your experience you've come up with one and you can tell us that there is a paranoid and you've never seen but one that's not schizophrenic? other . . .

Solicitor Foard: Now he doesn't give him a chance

to answer the question. He asked one and then pops off on another one.

Mr. Kirkland: I'll be glad to let him answer it. Answer it if you want to.

The Court: The witness had not answered.

Mr. Kirkland: I know he hadn't, Your Honor. I'm not getting any answers.

The Court: Yes, sir. You need to give him an opportunity to answer.

Q. Isn't it highly questionable if there is any question to pure paranoid?

A. Would you state the question again, please.

Q. I said isn't it highly questionable whether there is any case of pure paranoid?

A. That's semantics.

Q. Will you answer my question, sir?

A. Highly questionable that there is a pure case of paranoia?

Q. Pure paranoia without schizophrenia.

A. Very rare.

Q. So it's very rare?

A. That's right.

Q. Well, let's just get down to this case in particular. Why did you prescribe medication for this young man over here?

A. I prescribed a very mild sleeping pill for a short period of time, and that was the only medication he received.

Q. Doctor, when he's there for your observation and for your . . . what did you prescribe for him?

A. A drug known as quaalude, q-u-a-a-l-u-d-e (Spelled).

Q. Quaalude?

A. Yes, sir.

Mr. Kirkland: Just a moment.

Solicitor Foard: I'll tell you what it is, come here.

Q. Isn't it true that quaalude is an hypnotic drug, a sedative?

A. Yes, sir, it is a sedative.

Q. It's a hypnotic, isn't it? Isn't this true?

A. I'd rather call it a sedative.

Q. I didn't ask you what you'd rather call it. I asked you is it.

A. Yes, sir.

Q. So this is true, isn't it? You gave him a hypnotic drug. Doctor, you are not supposed to give them drugs while they are in there under observation, are you, unless they need it, unless something's wrong with them? Isn't this correct?

A. What do you mean something wrong with them?

Q. When a person is in there for observation, Doctor, isn't it out of the ordinary to give one medication when they are there for the purpose of observation?

A. It's not out of the ordinary to give them a sedative.

Q. Well, is this a sedative, just a sedative that you were giving him?

A. Yes, sir.

Q. And you want to stick with it's just a sedative, it's not a hypnotic?

A. Well, I only give it for a sedative effect.

Q. Well, I didn't ask you what you give it for. I'm asking you what it is.

A. Would you repeat your question? I believe I haven't understood it.

Q. I simply asked you if the drug you gave him is a hypnotic drug, isn't it?

A. The drug I gave him is a mild sleeping capsule and he only received it for a short period of time.

Q. The reason he quit receiving it he told you he didn't want to take it, wasn't it? Isn't that correct?

A. I don't recall that, sir.

Q. Would you deny it?

A. No, I wouldn't deny it.

Q. Now, Doctor, let me ask you, there's many people many, many, that are schizophrenic that is competent to be tried in court, isn't it?

A. That was a statement, sir.

Q. I says there are many people that are schizophrenic that are competent to be tried in court.

A. What's the question.

Q. I ask you, are there many that are schizophrenic that is competent to be tried in court?

A. Yes, there are.

Q. Doctor, there are many who are insane that can drive an automobile, isn't it?

A. Depends upon your definition of insanity.

Q. Well, let's get your definition. What do you describe as one being insane?

A. I prefer to use the word mentally ill.

Q. Well, let's use mentally ill then.

A. And the best definition I can give anyone on mental illness is that it is a persistent pattern of social behavior that is unacceptable to people in the community.

Q. Well, mentally ill people can drive automobiles, can't they?

A. Some can, some can't.

Q. Mental people can carry on a conversation every day with you and others, can't they?

A. Some can and some cannot.

Q. There are many in the State Hospital right today that has an I.Q. of over 117, isn't it?

A. I don't know how many, not too many.

Q. But I say there's many there.

A. There are patients there who have an I.Q. in that range.

Q. Now, Doctor, if I understand you correctly, your specialty in fact now that you've done your residency in psychiatric medicine, you are doing some . . . you are now practicing psychiatry, aren't you, in a general field?

A. No. I practice actually forensic psychiatry.

Q. Who in your organization out there does the practice in the adolescent psychiatry?

A. I don't know that we have an adolescent psychiatrist.

Q. You mean you don't even have one out there?

A. We have psychiatrists who treat adolescent patients.

Q. I didn't ask you that. I asked you did you have one who specialized in that field out there.

A. Not that I know of.

Q. Well, did a child psychologist, let's get into that, did any of them see this individual here?

A. A child psychologist?

Q. Yes, sir.

A. No, sir.

Q. Did an adolescent psychiatrist see him?

A. No, sir.

Q. Then a general psychiatrist, which is you . . .

A. Plus two other general psychiatrists.

Q. Well, they saw him just in an interview with you.

A. Well, they interviewed him independently.

Q. How many times did you really . . . let me ask you this, Doctor. Isn't it a matter of fact that after the second time that you talked to this boy you told

him you were going to return him but you had to see him on routine intervals while he was there?

A. I have documented the dates and the amount of time. I'll be glad to count it up for you.

Q. I didn't ask you that. Didn't you after the second visit tell him you were going to turn him back to the Court but you had to see him routinely while he was there?

A. No, sir.

Q. You deny this?

A. Yes, sir.

Q. Did you give him any other medications besides the one that you gave him?

A. No, sir.

Q. Well, don't you know that there is a rule that you are not supposed to give one who is there for observation drugs while you are observing him?

Solicitor Foard: Your Honor, he's asked that question about three or four times and he's testified what he gave him.

A. When a man gets pneumonia, I have to treat him.

Q. He wasn't there to be observed for pneumonia, was he?

A. But he could get it.

Q. But what you gave him went to the question of nerves or in conjunction with nerves, didn't it?

A. If he's too tense and too upset because he is in the center of the prison to cooperate, it's very helpful to give him a sedative to quiet him down or help him sleep better so that he can cooperate in the observation period.

Q. Doctor, in fact you never asked the defendant the first time anything about the factual situation, did you?

A. I'm sorry, sir, you'll have to repeat that question.

Q. I said you never asked the defendant the first time anything about what occurred or anything about it, did you?

A. About what?

Q. The crime.

A. I'm not trying the case. All I have to determine is whether the man is crazy or not.

Q. Now you are using the term crazy, aren't you?

A. All right, mentally ill.

Q. Doctor, I'm going to ask you again, did you ever try to find out what had occurred so you could properly evaluate this man?

A. What occurred in the alleged offense has no bearing upon this man's mental condition.

Q. It has no effect on your observation and on what you might would do?

A. That's correct.

Mr. Kirkland: I have no further questions.

RE-DIRECT EXAMINATION

By Solicitor Foard:

Q. In fact, I believe you agreed with another doctor that you'd rather not have too many facts when you first interviewed him, is that correct?

A. That's correct.

Mr. Kirkland: Now, Your Honor, this is his witness. That's not a question.

The Court: I agree with you. The doctor made that statement and this witness made that statement. Let's move on. Are there any other questions?

Solicitor Foard: Yes, sir.

The Court: Go ahead.

Q. Doctor, this medication that you gave him is for

the purpose of doing what to Cannon when he takes his pill?

A. Just to help him get a good night's sleep.

Q. A good night's sleep. Now, Doctor, when the hospital out here, you completed your training as a psychiatrist, they put you in the job of determining the sanity or insanity mostly of people charged with crimes?

A. That is correct.

Q. Now when you specialize in child psychiatry or some particular type, that's where you would be trying . . . would that be where you were trying to cure or help that type of person?

A. That's correct.

Q. You have . . . do you have to be a specialist in each field to determine the sanity of an adolescent or an adult?

A. No, sir, you don't even have to be a psychiatrist for that matter.

Q. In fact, it kind of helps not to be a psychiatrist sometimes, doesn't it?

Mr. Kirkland: Now, Your Honor, there we go again. I would probably agree with it where this is concerned.

The Court: No comments now by counsel. Let's move on.

Solicitor Foard: Thank you, Doctor, come on down. Thank you, sir.

Mr. Kirkland: One question.

RE-CROSS EXAMINATION

By Mr. Kirkland:

Q. Doctor, do you still contend that there is pure paranoia?

A. It's a rare condition but it does occur.

Q. And you can, you have books and papers that can back this theory up?

A. I have what, sir?

Q. Do you have any writings or any books or anything you can back this particular thing up?

A. No, sir, I have to base it on my own experience.

Q. So therefore you are the first one as far as you know, you have no past history of pure paranoia . . .

A. I can't remember every patient I've seen.

Q. And you find no, there's books and there's books that you study, you find none of that written in any of your books or your test books, do you?

A. Paranoia is in the test books reported as a rare condition.

Q. And so you just happened to run across one?

A. Yes, sir.

Mr. Kirkland: Thank you.

RE-DIRECT EXAMINATION

By Solicitor Foard:

Q. Doctor, in this case is John Cannon a schizophrenic paranoid or not?

A. He is not.

* * * *

CERTIORARI DENIED